



**BILLING CODE: 4510-FN-P**

**DEPARTMENT OF LABOR**

**Employment and Training Administration**

**20 CFR Parts 651, 652, 653, and 658**

**[Docket No. ETA-2022-0003]**

**RIN 1205-AC02**

**Wagner-Peyser Act Staffing**

**AGENCY:** Employment and Training Administration, Labor.

**ACTION:** Proposed rule; request for comment.

**SUMMARY:** The U.S. Department of Labor (Department or DOL) is issuing a notice of proposed rulemaking (NPRM) that, if finalized, would require States to use State merit staff to provide Wagner-Peyser Act Employment Service (ES) services. If finalized, this proposal would extend the merit-staffing requirement to those States that previously had been operating different staffing models. The proposed changes would create a uniform standard of ES services provision for all States and align the use of State merit staff for ES services with the requirement that States administer the Unemployment Insurance (UI) programs with State merit staff. The Department is additionally proposing revisions to the ES regulations to strengthen the provision of services to migrant and seasonal farmworkers (MSFWs) and to enhance the protections afforded by the Monitor Advocate System and the Employment Service and Employment-Related Law Complaint System (Complaint System).

**DATES:** To be ensured consideration, comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may submit written comments electronically via the Federal eRulemaking portal (<https://www.regulations.gov>). Follow the instructions on the website for submitting

comments (under “FAQ” > “Commenting”). Label all submissions with docket number ETA-2022-0003 and RIN 1205–AC02.

Please be advised that the Department will post all comments received that relate to this proposed rule on <https://www.regulations.gov> without making any change to the comments or redacting any information. The website is the Federal eRulemaking portal, and all comments posted there are available and accessible to the public. Therefore, the Department recommends that commenters remove personal information, such as Social Security numbers, personal addresses, telephone numbers, and email addresses, included in their comments. It is the responsibility of the commenter to safeguard personal information.

*Comments under the Paperwork Reduction Act of 1995 (PRA):* In addition to filing comments on any aspect of this proposed rule with the Department, interested parties may submit comments that concern the information collection (IC) aspects of this proposed rule to the Office of Information and Regulatory Affairs at <https://www.reginfo.gov/public/do/PRAMain>. Find relevant information collections by selecting “Currently under Review – Open for Public Comments” or by using the search function.

**FOR FURTHER INFORMATION CONTACT:** Heidi Casta, Acting Administrator, Office of Policy Development and Research, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue NW, Room N–5641, Washington, DC 20210, Telephone: (202) 693–3700 (voice) (this is not a toll-free number) or 1–800–326–2577 (TDD).

## **SUPPLEMENTARY INFORMATION:**

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**I. Acronyms and Abbreviations**

2020 Final Rule	Wagner-Peyser Act Staffing Flexibility; Final Rule, 85 FR 592 (Jan. 6, 2020)
AOP	Agricultural Outreach Plan
ARS	Agricultural Recruitment System
BFOQ	bona fide occupational qualification
BLS	U.S. Bureau of Labor Statistics
CFR	Code of Federal Regulations
CNPC	Chicago National Processing Center
COVID-19	coronavirus disease 2019
Complaint System	Employment Service and Employment-Related Law Complaint System
CRC	DOL Civil Rights Center
Department <i>or</i> DOL	U.S. Department of Labor
EEOC	Equal Employment Opportunity Commission
E.O.	Executive Order
EO	Equal Opportunity
ES	Wagner-Peyser Act Employment Service
ETA	Employment and Training Administration
FR	Federal Register
FTE(s)	full-time equivalent(s)
FUTA	Federal Unemployment Tax Act
IC(s)	information collection
ICR(s)	information collection request
IPA	Intergovernmental Personnel Act of 1970
LEP	limited English proficient
MOU(s)	memorandum/a of understanding
MSFW(s)	migrant and seasonal farmworker(s)
NAICS	North American Industry Classification System
NFJP	National Farmworker Jobs Program
NMA	National Monitor Advocate
NPRM <i>or</i> proposed rule	notice of proposed rulemaking
O*NET	Occupational Information Network
OEWS	Occupational Employment and Wage Statistics
OFLC	Office of Foreign Labor Certification
OIRA	Office of Information and Regulatory Affairs

OMB	Office of Management and Budget
OPM	Office of Personnel Management
OSHA	Occupational Safety and Health Administration
PIRL	Participant Individual Record Layout
PRA	Paperwork Reduction Act of 1995
Pub. L.	Public Law
PY	Program Year
RA(s)	Regional Administrator(s)
RFA	Regulatory Flexibility Act
RIN	Regulation Identifier Number
RMA(s)	Regional Monitor Advocate
Secretary	Secretary of Labor
SMA(s)	State Monitor Advocate(s)
SOC	Standard Occupational Classification
SSA	Social Security Act
Stat.	United States Statutes at Large
SWA(s)	State Workforce Agency/ies
TEGL	Training and Employment Guidance Letter
UI	Unemployment Insurance
UMRA	Unfunded Mandates Reform Act of 1995
U.S.C.	United States Code
WHD	Wage and Hour Division
WIA	Workforce Investment Act
WIOA	Workforce Innovation and Opportunity Act

## **II. Statutory and Legal Background**

### **A. Required Use of State Merit Staff for Delivery of ES Services**

The Wagner-Peyser Act of 1933 established the ES program, which is a nationwide system of public employment offices that provide public labor-exchange services. The ES program seeks to improve the functioning of the nation's labor markets by bringing together individuals seeking employment with employers seeking workers. Section 3(a) of the Wagner-Peyser Act directs the Secretary of Labor (Secretary) to assist States by developing and prescribing minimum standards of efficiency and promoting uniformity in the operation of the system of public employment-services offices. This NPRM would amend regulations in 20 CFR parts 651, 652, 653, and 658, and provide States with a uniform standard of ES services provision. States would be required to use State merit staff to provide ES services. The Department also is proposing targeted revisions to the regulations at parts 651, 653, and 658.

These proposed revisions are intended to ensure that State Workforce Agencies (SWAs) provide MSFWs with adequate access to ES services and that the role of the State Monitor Advocate (SMA) is effective. In addition, this NPRM would amend parts 651, 652, 653, and 658 to further integrate gender-inclusive language. Finally, the Department is proposing technical corrections to these CFR parts to improve consistency across the parts and to make them easier to understand.

Historically, the Department relied on its authority in secs. 3(a) and 5(b) of the Wagner-Peyser Act to require that ES services, including Monitor Advocate System activities for MSFWs and Complaint System intake, be provided by State merit-staff employees.<sup>1</sup> The Department consistently applied this requirement, with minor exceptions, until 2020. Specifically, beginning in the early 1990s, the Department authorized demonstration projects in which it allowed Colorado and Massachusetts limited flexibility to set their own staffing requirements. Thereafter, in 1998, the Department permitted Michigan to use State and local merit-staff employees to deliver ES services, pursuant to a settlement agreement arising out of *Michigan v. Herman*, 81 F. Supp. 2d 840 (W.D. Mich. 1998). All three States continued to operate as demonstration States with approved staffing flexibility through an exemption in their approved State plans.<sup>2</sup> Through rulemaking effective February 5, 2020, the Department removed the requirement that ES services be provided only through the use of State merit staff. *See* Wagner-Peyser Act Staffing Flexibility; Final Rule, 85 FR 592 (Jan. 6, 2020) (2020 Final Rule). In the preamble to this rule, the Department explained that it sought to allow States maximum flexibility in staffing arrangements. *Id.* Accordingly, under current regulations, States may use a variety of staffing models to provide ES services.

The Department has reassessed the approach adopted in the 2020 Final Rule and has determined that alignment of ES and UI staffing, which would allow ES staff to respond to

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<sup>1</sup> *Workforce Innovation and Opportunity Act; Department of Labor; Final Rule*, 81 FR 56072 (Aug. 19, 2016) (WIOA DOL-only Rule) (see 20 CFR 652.215, 653.108, 653.111, 658.602).

<sup>2</sup> *See* WIOA DOL-only Rule, 81 FR at 56267 and 56341 (2016).

surges of demand in UI, is more important than the efficiencies that flexibility may promote. Accordingly, as discussed below, the Department is proposing to require, with no exceptions, that States use State merit-staff employees to provide ES services. This NPRM proposes to require that all States, including the prior “demonstration States,” use State merit-staff employees to deliver ES services. This proposed staffing requirement would apply to all ES services, including services provided to MSFWs.

This proposal would once again align the provision of ES services with the requirement that States administer the UI programs with State merit staff. The ES system is designed to “promote the establishment and maintenance of a national system of public employment service offices,”<sup>3</sup> and the UI and ES systems together provide a basic level of employment support for more than 4 million job seekers per year to enter and reenter the workforce. The Department thinks that it is vital that the ES be administered so that services are delivered effectively and equitably to UI beneficiaries and other ES customers.

ES supports the work-test for UI, whereby UI recipients must demonstrate as a condition of continued UI receipt that they are workforce attached.<sup>4</sup> This includes various State-specific requirements including being able to work, available to work, and actively seeking work. Further, State merit ES staff are best positioned to and often do provide surge capacity for UI administration and adjudication.<sup>5</sup> The proposed rule ensures States are universally equipped to use cross-trained ES staff to assist in processing UI claims, assist UI claimants, and promote reemployment in times of high demand for such services. For example, the recent stress placed upon State UI systems in response to the coronavirus disease 2019 (COVID-19) pandemic served to highlight the necessity of States to be able to rely on eligible State merit staff who are

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<sup>3</sup> 29 U.S.C. 49.

<sup>4</sup> Federal Unemployment Tax Act (FUTA) sec. 3304(a)(1); Social Security Act (SSA) sec. 303(a)(2).

<sup>5</sup> SSA sec. 303(a)(1) provides that the Secretary shall make no certification for payment to any State unless they find that the law of such State, approved by the Secretary under FUTA, includes provision for “[s]uch methods of administration (including after January 1, 1940, methods relating to the establishment and maintenance of personnel standards on a merit basis, except that the Secretary . . . shall exercise no authority with respect to the selection, tenure of office, and compensation of any individual employed in accordance with such methods) as are found by the Secretary . . . to be reasonably calculated to insure full payment of unemployment compensation when due.”

already cross-trained or able to be quickly cross-trained to assist UI claimants during times of high demand placed on State UI systems. States have experienced the benefits of cross-training staff to assist during recessions, the onset of natural disasters, and mass regional layoffs, in which State merit staff are needed to assist with State-level decisions and functions. Emergencies such as natural disasters are occurring across States with increased frequency such that this need for surge capacity and cross-trained staff is becoming increasingly necessary. States can assist one another when one is impacted by a natural disaster, where non-impacted State merit staff, including cross-trained ES staff, provide claims adjudication assistance, such as fact finding/document analysis and claims processing of UI and Disaster Unemployment Assistance claims. Although the COVID-19 pandemic is an historically unprecedented event, in addition to disaster response, the UI system has been a key economic stabilizer in times of need such as the Great Recession, whereby State UI systems benefitted from cross-trained ES staff to provide extra capacity for UI administration and adjudication. Historical data from 1971 through 2021 indicates regular and periodic increases in the number of UI initial claims and first payments in which having ES staff who are already cross-trained or able to be quickly cross-trained to assist UI claimants would be beneficial. The adjudication of UI claims is work that must be performed by State merit staff.<sup>6</sup> Therefore, staff to assist with claims processing and adjudication must be merit staff directly employed by the State and available for States to redirect their work. Requiring that ES staff be State merit staff would allow the States to use ES staff to carry out both ES services and necessary UI functions.

In response to the COVID-19 pandemic, emergency legislation related to COVID-19 provided States the ability on a limited and temporary emergency basis to recruit staff on a non-merit basis to quickly process UI applications and claims.<sup>7</sup> However, relying on such time-

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<sup>6</sup> See 42 U.S.C. 503(a)(1).

<sup>7</sup> See sec. 4102(b) of the Families First Coronavirus Response Act (Pub. L. 116-127), including Division D Emergency Unemployment Insurance Stabilization and Access Act of 2020 (EUISAA); sec. 2106 of the Coronavirus Aid, Relief, and Economic Security Act of 2020 (CARES Act) (Pub. L. 116-136); sec. 205 of the Continued Assistance Act (Pub. L. 116-260); and sec. 9015 of the American Rescue Plan Act of 2021 (Pub. L. 117-

limited legislative action is not a viable, long-term solution, particularly as providing adequate training for UI adjudicators takes several months to a year. Furthermore, emergency legislation related to COVID-19 does not provide flexibility in future emergencies. Requiring ES labor exchange services to be provided by State merit staff will help ensure that States have the ability to shift staff resources during future exigencies affecting State-level functions and UI claims where time-limited legislative solutions are not available and there is a pressing need to have cross-trained staff who are legally permitted to assist with UI services.

In addition, in the Intergovernmental Personnel Act (IPA), 42 U.S.C. 4701, *et seq.*, Congress found that the quality of public service could be improved if government personnel systems are administered consistent with certain merit-based principles. 42 U.S.C. 4701. Requiring States to employ the professionals who deliver ES services in accordance with these principals would help ensure that ES services are delivered by qualified, non-partisan personnel who are directly accountable to the State. Among other things, such professionals would be required to meet objective professional qualifications, be trained to assure high-quality performance, and maintain certain standards of performance. *Id.* They would also be prohibited from using their official authority for purposes of political interference, and States would be required to assure that they are treated fairly and protected against partisan political coercion. *Id.* By contrast, contract staff and subrecipient staff are employed by and accountable to non-State entities, and their individual adherence to State-issued policies and procedures is not directly observable. And, as noted previously, it is important that the States use State merit staff to deliver ES services because of the critical alignment between the ES and UI programs.

In proposing this State merit-staffing requirement, the Department relies on its authority under secs. 3(a) and 5(b)(2) of the Wagner-Peyser Act, as well as authority under sec. 208 of the

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2). This flexibility only applied for responding to workload and increased demand resulting from the spread of COVID-19 and was limited to engaging temporary staff, rehiring retirees or former employees on a non-competitive basis, and other temporary actions to quickly process applications and claims.



IPA, 42 U.S.C. 4728, as amended. Each of these provisions, standing alone, provides the Department with the discretion to require States to use State merit staff to provide ES services.

Specifically, sec. 3(a) of the Wagner-Peyser Act requires the Secretary to assist in coordinating the ES offices by “developing and prescribing minimum standards of efficiency.” As the court in *Michigan v. Herman*, 81 F. Supp. 2d 840 (W.D. Mich. 1998), concluded, “the language in [sec. 3(a)] authorizing the Secretary to develop and prescribe ‘minimum standards of efficiency’ is broad enough to permit the Secretary. . . to require merit staffing.” *Id.* at 848.

In addition, sec. 5(b)(2) of the Wagner-Peyser Act provides that the Secretary shall from time to time certify to the Secretary of the Treasury for payment to each State that, among other things, “is found to have coordinated the public employment services with the provision of unemployment insurance claimant services.” As explained previously, the proposed merit-staffing requirement would align the staffing of ES services with the staffing that States are required to use in the administration of UI programs. This would allow cross-trained ES staff to assist States in processing and adjudicating UI claims, and assisting claimants with work search and reemployment services, particularly in times of high need, such as during the pandemic. It would, therefore, be reasonable for the Department to base the finding required by sec. 5(b)(2) of the Wagner-Peyser Act, in part, on a State’s agreement to use State merit staff to administer and provide ES services.

Additionally, sec. 208 of the IPA authorizes Federal agencies to require, as a condition of participation in Federal assistance programs, systems of personnel administration consistent with personnel standards prescribed by the Office of Personnel Management (OPM).<sup>8</sup> In accordance with 5 CFR 900.605, the Department has submitted this proposed rule to OPM for review and has received prior approval.

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<sup>8</sup> 42 U.S.C. 4728(b); *see also* 5 CFR 900.605 (authorizing Federal agencies to adopt regulations that require the establishment of a merit personnel system as a condition for receiving Federal assistance or otherwise participating in an intergovernmental program with the prior approval of OPM).

The Department acknowledges that this proposal constitutes a change in its existing position and would require certain States to adjust how they deliver ES services. The Department notes that Federal agencies are permitted to change their existing policies if they acknowledge the change and provide a reasoned explanation for the change. *See, e.g., Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221-22 (2016). As explained previously, the Department is proposing this change to ensure that more workers will be available in the States if needed to back up the UI system. In the section-by-section discussion that follows, the Department further explains why it is proposing to require that States use State merit-staff employees to provide ES services, acknowledges the reliance interests of States that would need time to come into compliance with this requirement, and addresses those interests by proposing an 18-month transition period.

**B. Strengthening the Provision of Services to Migrant and Seasonal Farmworkers**

In addition to a merit-staffing requirement, the Department is proposing targeted revisions to the regulations at parts 651, 653, and 658. The proposed revisions are intended to ensure that SWAs provide adequate outreach services to MSFWs and that SMAs, Regional Monitor Advocates (RMAs) and the National Monitor Advocate (NMA) have the authority, tools, and resources that they need to monitor SWA compliance with the ES regulations. As described in detail in the section-by-section discussion that follows, the proposed revisions would strengthen the Monitor Advocate System established in the wake of *NAACP, Western Region et al. v. Brennan*, 360 F.Supp. 1006 (D.D.C. 1973), and ensure that SWAs offer and provide ES services to MSFWs in a manner that is qualitatively equivalent and quantitatively proportionate to the ES services that they offer and provide to other job seekers. Additional proposed revisions include technical edits to improve clarity, such as adding commas or cross-references.

### **III. Section-By-Section Discussion of Proposed Rule**

#### **A. Technical Amendments and Global Edits**

To conform with the proposed changes to the definition of *Wagner-Peyser Act Employment Service (ES) also known as Employment Service (ES)* in § 651.10, the Department proposes making technical changes to replace the phrases “employment services,” “Wagner-Peyser Act services,” and “services provided under the Wagner-Peyser Act” with “ES services.” Changes also have been made to replace the phrase “employment office” with “ES office,” and “Wagner-Peyser Act participants” with “ES participants.” These changes will simplify and standardize the use of terminology. The proposed language is also intended to improve usage of plain language within the regulations. Technical changes to articles, specifically changing “a” to “an” where necessary, have been made as well when preceding “ES office.” These changes have been made in § 651.10 within the definitions for *applicant holding office*, *Employment Service (ES) office*, *field visits*, *outreach staff*, *placement*, and *reportable individual*, in addition to the changes in the definition of *Wagner-Peyser Act Employment Service (ES) also known as Employment Service (ES)*. Conforming changes have also been made to the subpart heading at part 652, subpart C, and within the regulatory text at §§ 652.205, 652.207, 652.215, 653.107, 653.108, 658.411, 658.502, 658.602, and 658.603.

The Department is proposing several technical edits to refine gender-inclusive language within the regulatory text while maintaining plain language principles. Throughout parts 651, 653, and 658, the term “he/she” was used to denote an individual of unknown gender. Using terms with a slash may not be in keeping with plain language principles and may also exclude people who are nonbinary. The Department is proposing three technical edits to replace “he/she” with more inclusive language employing plain language principles.

First, where “he/she” refers to an individual in their professional capacity, the Department proposes using their job title instead of a pronoun. These edits largely affect regulations impacting the NMA or the RMA. In these cases, “he/she” has been replaced with

“the NMA” or “the RMA” as appropriate and “his/her” with the possessive pronoun “their.”

These edits are made at §§ 658.602 and 658.603.

Second, where “he/she” refers to an employer that is not an individual person, the Department proposes using the pronoun “it.” Where the possessive pronouns “his/her” were used, the Department proposes using “its.” This is appropriate because employers are entities, not individuals, and the proper pronoun is “it.” This edit is made at §§ 658.502 and 658.504.

In all other cases where “he/she” was used, the Department proposes using the pronoun “they” in its capacity as a gender-inclusive third-person singular pronoun but conjugated with third-person plural verbs. Where the possessive pronouns “his/her” were used, the Department proposes using “their.” These changes are designed to remove binary gender language so that the full regulatory text is gender inclusive. The Department makes these changes in § 651.10 in the definition of *seasonal farmworker*. Edits are also made to §§ 653.107, 653.108, 653.111, 653.501, 653.502, 658.400, 658.410, 658.411, 658.421, 658.422, 658.602, 658.603, 658.702, 658.705, 658.706, and 658.707.

In addition, the Department proposes to replace the words “handle” and “handled” with “process” and “processed,” as appropriate, to clarify that actions by ES staff and Federal staff must follow the processing requirements listed throughout part 658, subparts E and H, which use the word “process.” The word “handle” does not have a specific meaning in the regulatory text and may be unclear to SWAs.

In some instances, the Department also proposes conforming technical amendments to correct grammar in the regulations, as needed, because of these changes. In addition to such conforming technical amendments, the Department proposes adding and removing commas throughout the regulatory text to improve clarity and readability. These global changes and technical amendments described in this section are not explicitly identified later in the section-by-section discussion.

## **B. Part 651 – General Provisions Governing the Wagner-Peyser Act**

### **Employment Service**

Part 651 (§ 651.10) sets forth definitions for parts 652, 653, 654, and 658. The Department proposes to revise the following definitions to better align them across the regulatory text, as well as practice in the field, and to make them conform with other revisions the Department proposes to make in this NPRM, including changes to staffing requirements.

The Department proposes to revise the first sentence of § 651.10 by providing the full title of the statute for the existing WIOA reference and identifying where WIOA is codified. These additions will help ensure the definitions in this section apply to WIOA, as published at 29 U.S.C. 3101 et seq.

The Department proposes to add a definition for *apparent violation* to clarify that the term means a suspected violation of employment-related laws or ES regulations, as set forth in § 658.419. The Department has observed that SWAs have used inconsistent descriptions of the term in their policies and procedures, which are not always consistent with § 658.419. The proposed definition is derived from existing regulatory language at § 658.419, which describes that an apparent violation is a suspected violation of employment-related laws or ES regulations.

The Department proposes to amend the definition of *applicant holding office* to replace “a Wagner-Peyser Employment Service Office” with “an ES office.” The definition of *Wagner-Peyser Act Employment Service (ES) also known as Employment Service (ES)* explains that ES offices refers to ES offices described under the Wagner-Peyser Act. Additionally, the definition of *ES office* explains that ES offices provide ES services as a one-stop partner program. Therefore, the reference to “a Wagner-Peyser Employment Service office” is redundant and unnecessary.

The Department proposes to amend the definition of *career services* to refer to WIOA by its acronym rather than its full title because the full title is previously spelled out at the beginning of this section.

The Department proposes to amend the definition of *clearance order* to add a citation to the Agricultural Recruitment System (ARS) regulations at part 653, subpart F. The purpose of this addition is to clearly identify the ARS regulations to which the term refers.

The Department proposes to amend the definition of *Complaint System Representative* to specify that the Complaint System Representative must be trained. The addition of the word “trained” makes the definition consistent with the requirement in § 658.410(g) and (h) that complaints are processed by a trained Complaint System Representative. The Department also proposes to remove the words “individual at the local or State level” due to proposed changes to the definition of *ES staff*.

The Department proposes to amend the definition of *Employment and Training Administration (ETA)* to remove the words “of Labor” after “Department” because *Department* is previously defined in this section as “the United States Department of Labor.”

The Department proposes to amend the definition of *Employment Service (ES) office* to replace “Wagner-Peyser Act” with “ES.” This change would align the definition with proposed changes to the definition of *Wagner-Peyser Employment Service (ES) also known as the Employment Service (ES)* and make the reference to ES consistent across all parts of the ES regulations.

The Department proposes to amend the definition of *Employment Service (ES) Office Manager* to replace the phrase “all ES activities in a one-stop center” with the phrase “ES services provided in a one-stop center.” This change would align the definition with other proposed changes to the regulatory text and definitions, which refer to “ES services,” instead of “ES activities.” The Department also proposes to replace “individual” with “ES staff person” to clarify that the *ES Office Manager* must be *ES staff*, as defined in this section.

The Department proposes to amend the definition of *Employment Service (ES) staff* in two ways. First, the Department proposes to replace the phrase “individuals, including but not limited to State employees and staff of a subrecipient,” with “State government personnel who

are employed according to the merit system principles described in 5 CFR part 900, subpart F—Standards for a Merit System of Personnel Administration, and” to conform with the imposition of the merit-staffing requirement proposed in § 652.215. Second, the Department proposes to delete the phrase “to carry out activities authorized under the Wagner-Peyser Act,” because this language is unnecessary. The ES regulations in parts 652, 653, and 658 describe the activities and services that ES staff are authorized or required to carry out. The proposed changes are intended to define a term that, when referenced, will clearly identify services or tasks that must be performed by State merit staff, and to simplify terminology throughout all parts. The revised definition also makes clear that ES staff includes a SWA official.

The Department proposes to amend the definition of *field checks* in several ways. First, the Department proposes to replace the term “job order” with “clearance order,” which is more accurate because field checks must be conducted on clearance orders as defined in § 651.10. Second, the Department proposes to clarify in the definition that field checks may also be conducted by non-ES State staff, in addition to ES or Federal staff, if the SWA has entered into an arrangement with a State enforcement agency (or agencies) to conduct field checks. This proposed revision aligns the definition with existing practice permitted by the regulation at § 653.503, which allows SWA officials to enter into formal or informal arrangements with appropriate State and Federal enforcement agencies where the enforcement agency staff may conduct field checks instead of and on behalf of ES personnel.

Additionally, the Department proposes to remove from the definition that field checks are “random” appearances. The proposed revision would clarify that the selection of the clearance orders on which the SWA will conduct field checks does not need to be random, though random field checks may still occur. The revision clarifies that field checks may be targeted, where necessary, to respond to known or suspected compliance issues, thereby improving MSFW worker protection. In addition, if a SWA makes placements on 9 or fewer clearance orders, the SWA must conduct field checks on 100 percent of those clearance orders. See § 653.503(b).

Therefore, in those cases, field checks could not be conducted on a random basis. These proposed revisions would clarify the definition and make it consistent with § 653.503(b).

The Department proposes to amend the definition of *field visits* in several respects. First, the Department proposes to clarify that field visits are announced appearances by SMAs, RMAs, the NMA, or NMA team members. This term is currently defined to include appearances by Monitor Advocates or outreach staff, and the proposed revision would clarify which Monitor Advocates may conduct field visits and that the appearances are announced, and not unannounced, as with field checks. Second, the Department proposes to replace the reference to “employment services” with “ES services” to conform with the use of the “ES” abbreviation throughout the regulatory text. Third, the Department proposes to amend the definition to specify that field visits include discussions on farmworker rights and protections. The Department has observed through monitoring that outreach staff and SMAs do not always discuss farmworker rights and protections during field visits as part of broader discussions about “other employment-related programs,” and instead only cover information on ES services. An explicit reference to discussions on farmworker rights and protections in the definition will help ensure that these issues are consistently addressed.

The Department proposes to amend the definition of *Hearing Officer* to remove the words “of Labor” because § 651.10 previously defines “Department” as “the United States Department of Labor.”

The Department proposes to amend the definitions of *interstate clearance order* to indicate that it is an agricultural “clearance” order for temporary employment instead of a “job” order. This change aligns the definitions of job order and clearance order in this part.

The Department also proposes to amend the definition of *intrastate clearance order* in two ways. First, the Department proposes to amend the definition to indicate that it is an agricultural “clearance” order for temporary employment instead of a “job” order. This change aligns the definition with the definitions of job order and clearance order in this part. Second, the



proposed revision clarifies that the term means an agricultural clearance order for temporary employment describing one or more hard-to-fill job openings, which an ES office uses to request recruitment assistance from *all* other ES offices within the State. The current definition does not include the word “all.” Therefore, it was not clear that such a request must go to all other offices in the State, and some ES offices were not distributing the clearance order to all offices. This clarification will help SWAs understand that an intrastate clearance order must be circulated to all ES offices within the State.

The Department proposes to amend the definition of *migrant farmworker* by removing the exclusion of full-time students who are traveling in organized groups. The Department proposes considering anyone who meets the definition of migrant farmworker to be considered as such, including full-time students performing farmwork. This change will make the benefits and protections of the Monitor Advocate System, including safeguards built into the Complaint System, ES service requirements, and equity and minimum service levels, available to full-time students traveling in organized groups. The exclusion of full-time students from existing regulatory text was premised on the fact that full-time students did not need to meet minimum farmwork or income requirements, which no longer exist in the ES regulations. Therefore, the reference is no longer relevant to the *migrant farmworker* definition.

The Department proposes to remove the definition of *migrant food processing worker* because migrant food processing worker status has not been a separately tracked part of the MSFW definition since the ES regulations were updated in 2016. See 81 FR 56071 (Oct. 18, 2016). Current ETA reporting does not require States to document migrant food processing workers as a particular type of MSFW and this definition is unnecessary because the existing MSFW definitions are inclusive of individuals who perform work as migrant food processors.

The Department proposes to amend the definition of *Occupational Information Network (O\*NET)* to remove the word “system” from the definition, as it is not needed to describe O\*NET.

The Department proposes to amend the definition of *O\*NET-SOC* to remove the words “of Labor” after “Department” because Department is previously defined in this section as “the United States Department of Labor.”

The Department proposes to amend the definition of *outreach staff* to clarify that SMAs are not considered outreach staff. The SMA’s role includes monitoring and providing guidance related to outreach staff but does not include acting as outreach staff. Outreach staff are a separate set of staff described in § 653.107(b). As noted in § 653.108, no State may dedicate less than full-time staffing for the SMA position, unless the Regional Administrator (RA), with input from the RMA, provides written approval. The SMA must also be able to review outreach efforts as required in § 653.108(o) and have adequate time to complete the extensive duties described in § 653.108. While an SMA may join ongoing outreach efforts, § 653.107 requires SWAs to employ an adequate number of outreach staff.

The Department proposes to revise the definition of *respondent* by removing the parenthetical language “including a State agency official” because the term “State agency” is assumed to include “State agency officials” and it is therefore unnecessary to distinguish “State agency officials” in addition to the State agency.

The Department is proposing to remove the exclusion of non-migrant full-time students from the definition of *seasonal farmworker*. This change would allow full-time students who work in seasonal farmwork to be considered seasonal farmworkers and would make the definition of *seasonal farmworker* consistent with the definition of *migrant farmworker*.

The Department proposes to revise the definition for *significant MSFW one-stop centers* in several ways. First, by removing the requirement that the designation be made annually, the Department can better rely on multiple data sources that are published in intervals up to every 5 years, including the Census of Agriculture and the Quarterly Census of Employment and Wages. This will help ensure the designation more accurately aligns with supporting data on the number of MSFWs in the service area. Based on the Department’s

analysis of census and other SWA data, the data do not change significantly on an annual basis and, therefore, it is often unnecessary to change the designations. If annual adjustments are warranted by the data, the Department will make adjustments in annual designations. This change would allow the list of significant MSFW one-stop centers to remain the same if there is no compelling reason to make a change. The Department also proposes to add that significant MSFW one-stop centers will also include ES offices where MSFWs account for 10 percent or more of reportable individuals in the ES annually, not just 10 percent or more of participants. This corresponds to the proposed change in §§ 653.103(a) and 653.109(b)(10), which would require ES offices to determine and collect data on the number of reportable individuals who are MSFWs. This proposal is intended to more closely correlate the designation of significant MSFW one-stop centers to the total number of MSFWs—and, therefore, potential participants—in the area, as opposed to just the number of existing participants in the area. Relying solely on the number of existing MSFW participants in the area fails to account for all other MSFWs in the area who could potentially become participants and does not account for situations where the number of participants in the area is low due to failure to perform adequate outreach or to make services available to MSFWs so that MSFWs who are reportable individuals may receive participant level services. In those cases, the number of participants is not an accurate indicator of the need for MSFW-specific ES services in the area. These proposed changes provide a more accurate representation of the number of MSFWs in the area who could benefit from access to ES services. The Department also is proposing to retain language permitting the Department to consider special circumstances beyond the estimated number of MSFWs in the area in designating significant MSFW one-stop centers.

The Department proposes to amend the definition of *significant MSFW States*. Similar to the proposed changes to the definition of *significant MSFW one-stop centers*, the Department proposes to remove the annual designation requirement from the definition of *significant MSFW States*. The Department proposes to rely on information from the Census of Agriculture, which is

published every 5 years, and the Quarterly Census of Employment and Wages, which publishes a quarterly count of employment and wages. These data sources provide the most reliable farmworker estimates available. Additionally, the Department proposes to add “estimated” before “number of MSFW” and remove the word “participants” because the Department intends to use the estimated number of MSFWs in each State, instead of exclusively the number of MSFW participants in the State to more accurately determine which States have the most MSFW activity and should therefore be designated as *significant MSFW States*. Relying on the estimated number of MSFWs in a State means the Department will account for those MSFWs who may eventually become participants instead of only focusing on States with the highest existing number of participants.

The Department proposes to delete the definition of *significant multilingual MSFW one-stop centers* in its entirety because the Department is proposing changes to § 653.102 to remove specific requirements for offices that would meet the definition. The Department proposes to remove these specific requirements for *significant multilingual MSFW one-stop centers* because all one-stop centers must comply with the language access requirements in 29 CFR 38.9, which prohibit discrimination on the basis of national origin, including limited English proficiency (LEP). The Department created the *significant multilingual MSFW one-stop center* definition and language access requirements at § 653.102 before comprehensive language access requirements implementing section 188 of WIOA were codified in 29 CFR part 38. The regulations at 29 CFR 38.9 establish that language access requirements apply to services provided to all LEP individuals at all one-stop centers and are broader than the existing requirements for *significant multilingual MSFW one-stop centers*. For these reasons, the designation of *significant multilingual MSFW one-stop centers* is no longer necessary. Additionally, having separate requirements for *significant multilingual MSFW one-stop centers* may inaccurately create the appearance that there are two sets of language access standards, or that requirements for *significant multilingual MSFW one-stop centers* are narrower. Removing the *significant*

*multilingual MSFW one-stop center* definition therefore clarifies that the comprehensive language access requirements at 29 CFR 38.9 apply to all one-stop centers.

The Department proposes to remove the definition of *State Workforce Agency (SWA) official*, because SWA officials would be considered ES staff based on the Department's proposed revisions to the definition of *ES staff* in this rulemaking.

The Department is proposing to amend the definition of *Wagner-Peyser Act Employment Service (ES) also known as Employment Service (ES)* to replace the phrase "employment services" with "ES services." This change would simplify the use of terminology throughout all parts. The Department also proposes to remove the words "and are" from the definition for greater clarity.

**C. Part 652 – Establishment and Functioning of State Employment Service**  
**Subpart C – Employment Service Services in a One-Stop Delivery System Environment**

**1. Subpart A – Employment Service Operations**

This subpart includes: an explanation of the scope and purpose of the ES; the rules governing allotments and grant agreements; authorized services; administrative provisions; and rules governing labor disputes. The Department's proposed amendments to subpart A focus solely on administrative provisions governing nondiscrimination requirements.

**Section 652.8 Administrative provisions.**

Section 652.8 covers administrative matters, including: financial and program management information systems; recordkeeping and retention of records; required reports; monitoring and audits; costs; disclosure of information; sanctions; and nondiscrimination requirements.

The Department proposes to correct the statutory reference in § 652.8(j)(2) regarding the bona fide occupational qualification (BFOQ) exception currently listed in the regulation as 42 U.S.C. 2000(e)-2(e) to 42 U.S.C. 2000e-2(e).

The Department proposes to amend § 652.8(j)(3) to remove an outdated reference to affirmative action requests to make the Department’s regulation consistent with U.S. Supreme Court jurisprudence on race-based affirmative action.<sup>9</sup> The proposed revision clarifies that the States’ obligation is to comply with 41 CFR 60-300.84. The regulation at 41 CFR 60-300.84 requires ES offices to refer qualified protected veterans to fill employment openings required to be listed with ES offices by certain Federal contractors; give priority to qualified protected veterans in making such referrals; and, upon request, provide the Office of Federal Contract Compliance Programs with information as to whether certain Federal contractors are in compliance with the mandatory job listing requirements of the equal opportunity clause (41 CFR 60-300.5). Consistent with this proposed amendment, the Department also proposes to remove the phrase “and affirmative action” from the paragraph heading for § 652.8(j). The Department reminds SWAs that they have an affirmative outreach obligation under 29 CFR 38.40 that requires them to take appropriate steps to ensure they are providing equal access to services and activities authorized under the Wagner-Peyser Act, as well as any other WIOA title I-financially assisted programs and activities. As outlined in that regulation, these steps should involve reasonable efforts to include members of the various groups protected by the WIOA sec. 188 regulations, including but not limited to persons of different sexes, various racial and ethnic/national origin groups, members of various religions, individuals with limited English proficiency, individuals with disabilities, and individuals in different age groups.

## **2. Subpart C – Employment Service Services in a One-Stop Delivery System Environment**

This subpart discusses State agency roles and responsibilities; rules governing ES offices; the relationship between the ES and the one-stop delivery system; required and allowable ES services; universal service access requirements; provision of services for UI claimants; and State

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<sup>9</sup> See, e.g., *Ricci v. DeStefano*, 557 U.S. 557, 585 (2009); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 238 (1995); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989).

planning. Among other changes, the NPRM's proposed changes to regulations under subpart C are tailored to require all States to use State merit staff to provide ES services, reinstating a longstanding requirement that existed prior to the 2020 Final Rule, and extending the requirement to those States using different staffing arrangements under the rule as it existed prior to the 2020 Final Rule. As was true when the regulations were changed in 2020, none of the changes proposed at this time will impact the personnel requirements of the Vocational Rehabilitation (VR) program, one of the six core programs in the workforce development system that is authorized under title I of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended by title IV of WIOA. The Rehabilitation Act has specific requirements governing the use of State VR agency personnel for performing certain critical functions of the VR program.

**Section 652.204 Must funds authorized under the Governor's Reserve flow through the one-stop delivery system?**

This section explains that the Governor's Reserve funds may, but are not required to, flow through the one-stop delivery system and provides a list of allowable uses for those funds. The Department proposes to simplify the section heading to remove reference to the Wagner-Peyser Act because reference to the Governor's Reserve is adequate. The Department also proposes to amend this section to reference professional development and career advancement of ES staff instead of SWA officials. Under the proposed revisions to the definitions found in part 651, ES staff would exclusively refer to State merit staff. This NPRM proposes to remove the term SWA official as a defined term in § 651.10, as the term is made redundant under the proposed changes.

**Section 652.215 Can Wagner-Peyser Act-funded activities be provided through a variety of staffing models?**

This section currently provides States the option to provide ES services through a variety of staffing models. For the reasons set forth in this NPRM, the Department proposes to amend § 652.215 to require all States, including the historically exempted "demonstration States," to

provide labor exchange services described in § 652.3 of this part through State merit staff. The staffing requirement applies to ES services provided to MSFWs. Specifically, the proposed regulatory text states that labor exchange services must be provided by ES staff. Under proposed revisions to the definitions (§ 651.10), ES staff will exclusively refer to State merit staff.

Historically, the Department relied on authority under sec. 3(a) of the Wagner-Peyser Act, which requires the Department to assist in coordinating State ES offices and improve their usefulness by setting minimum standards of efficiency and promoting their uniform administration, as well as authority in sec. 5(b) of the Wagner-Peyser Act, to promulgate regulations prescribing the use of State merit staff. Prior to 2020, in support of its longstanding State merit staff requirement for ES services, the Department explained that the benefits of merit-staffing in promoting greater consistency, efficiency, accountability, and transparency are well established.<sup>10</sup> The Department's discretion to require the use of State merit staff to provide ES services was affirmed in *Michigan v. Herman*, 81 F. Supp. 2d 840 (W.D. Mich. 1998). As explained earlier in this preamble, in the 1990s, the Department approved limited exemptions from the merit-staffing requirement for three States (Colorado, Massachusetts, and Michigan) during the establishment of the one-stop delivery system to test alternative service-delivery models, but subsequently noted that no additional exemptions would be authorized.

In the 2020 Final Rule, the Department changed its longstanding policy and determined that granting States flexibility in staffing potentially would give States flexibility to meet the unique needs of ES customers, free up resources to serve employers and job seekers, and better integrate ES services with other WIOA programs. The Department also stated that similar programs operated successfully with flexible staffing arrangements and, therefore, staffing flexibility should be provided under the Wagner-Peyser Act. However, the recent stress placed upon State UI systems in response to the COVID-19 pandemic served to highlight the necessity of States to

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<sup>10</sup> See 64 FR 18662, 18691 (April 15, 1999) (Workforce Investment Act (WIA) Interim Final Rule); 65 FR 49294, 49385 (Aug. 11, 2000) (WIA Final Rule); 80 FR 20690, 20805 (April 16, 2015) (WIOA NPRM); 81 FR 56072, 56267 (Aug. 19, 2016) (WIOA Final Rule).



be able to rely on State merit staff who are already cross-trained or able to be quickly cross-trained and legally permitted to assist UI claimants during times of high demand placed on State UI systems. As discussed above, the Department has reassessed the factors it weighed in the 2020 Final Rule and has determined that the alignment of ES and UI staffing is more important than the efficiencies that flexibility may promote, and that it is vital that the ES be administered so that quality services are delivered effectively and equitably to UI beneficiaries and other ES customers. Accordingly, the Department is now proposing to require, with no exceptions, that States use State merit-staff employees to provide ES services. This proposed rule ensures States are universally equipped to use cross-trained ES staff to assist in processing and adjudicating UI claims, and assisting claimants with work search and reemployment services. As described previously, the Department relies on authority under secs. 3(a) and 5(b) of the Wagner-Peyser Act, as well as sec. 208 of the IPA, to exercise discretion to require the use of State merit staff to deliver ES services.

To improve clarity, the Department proposes revising the section heading from “Can Wagner-Peyser Act funded activities be provided through a variety of staffing models?” to “What staffing model must be used to deliver services in the Employment Service?” In addition, the Department proposes revising the regulatory text by adding a new paragraph (a), which specifies that the Secretary requires that the labor exchange services described in § 652.3 be provided by ES staff. This revision is proposed to reinstate the State merit-staffing requirement and align with the proposed definitions of ES and ES staff in § 651.10.

The Department further proposes to add a new paragraph (b), which provides that the staffing requirement in this section would have the same effective date as other proposed changes in this NPRM and would become effective 60 days after publication of the final rule in the *Federal Register*. The Department also proposes to add a new paragraph (c), which specifies a compliance date for proposed § 652.215 (i.e., the date on which the requirements of this section would become enforceable) of 18 months after the effective date of the final rule. The

Department acknowledges that for States currently using different staffing models for the provision of ES services, both those that have been using different models for many years and those that changed or have begun to change their staffing models due to the 2020 Final Rule, the use of State merit staff may take time to implement.

In the short period of time that staffing flexibility has been available to all States, the Department is aware that a few States expressed an interest in using that flexibility. Some States may have taken steps to use the staffing flexibility without modifying their approved State plans, under which they indicate that they are using State merit staff to deliver ES services. At least one State has submitted a State plan modification indicating that the State intends to use non-State merit staff to provide ES services. Reinstating the State merit-staffing requirement will impact these States, but the Department thinks that the impact will be minimal, as described in the regulatory impact analysis section of this proposal (sec. III.A of the preamble).

The Department recognizes that this proposed change will have the most impact on the three demonstration States, Colorado, Massachusetts, and Michigan. Since the 1990s, these three States have relied on an exemption in their approved State plans to use some limited form of non-State-merit staffing. Any burden imposed on these three States by the proposal to require their use of only State merit staff may be mitigated by the States' currently approved staffing models. Colorado and Michigan both use only merit-staffing to deliver ES services, but they employ merit staff at both the State and local level to deliver services. For these States, the proposed regulation would require that they discontinue their use of local merit staff and use only State merit staff. Massachusetts uses some non-merit staff, but that use of non-merit staff is only approved in 4 out of 16 local areas in the State. In the remaining local areas, Massachusetts uses State merit staff to deliver ES services. Accordingly, while disruption in service delivery may occur due to this change, the Department anticipates that disruption to these States' ES service delivery will be minimal. As noted in the regulatory impact analysis, prior to publication of this NPRM, the Department surveyed the demonstration States on any transition costs that

may be incurred by the proposed State merit-staffing requirement. While the Department acknowledges that there may be some cost to these three States due to this change, the Department believes that the rationale for requiring the use of State merit staff applies equally to the demonstration States, and that the long-term benefits of having cross-trained ES staff outweigh the cost to these States of transitioning to the use of State merit staff. The Department seeks comment on the benefits and costs of transitioning to a State merit-staffing requirement in instances where States are using staff other than State merit staff to deliver services. In addition, the Department seeks comment on any positive or negative impact this change would have in terms of the quality of services provided within the American Job Centers—including those funded by WIOA.

However, acknowledging that these three States, and any State that had taken action under the 2020 Final Rule, will be unable to immediately comply with this proposed requirement, the Department proposes to provide 18 months for States to implement the State merit-staffing requirement in order to provide States with adequate time to consider and implement any necessary changes to come into compliance, including time to resolve outstanding contractual obligations and align changes with the timed financial allotments. The Department is open to adjusting this time period and, accordingly, it seeks comments from States regarding whether 18 months is sufficient time to comply with this requirement. The Department also seeks comments from States describing other regulatory changes States believe are necessary to effectuate compliance with the proposed changes.

#### **D. Part 653 – Services of the Wagner-Peyser Act Employment Service System**

Part 653 sets forth the principal regulations of the ES concerning the provision of services for MSFWs consistent with the requirement that all services of the workforce development system be available to all job seekers in an equitable fashion. The regulations in this part establish special services to ensure MSFWs receive the full range of career services, as defined in WIOA sec. 134(c)(2), 29 U.S.C. 3174(c)(2), and contain requirements that SWAs establish a

system to monitor their own compliance with ES regulations governing services to MSFWs. As noted elsewhere in this preamble, the proposed State merit-staffing requirement discussed in part 652 would also apply to delivery of all ES services to MSFWs, including outreach services and the Monitor Advocate System discussed in the following section. References to staffing throughout this part of the proposed rule, even where the Department has not proposed changes, refer to State merit staff.

## **1. Subpart B – Services for Migrant and Seasonal Farmworkers (MSFWs)**

### **Section 653.100 Purpose and scope of subpart.**

The Department proposes to amend § 653.100(a) to clarify that the provision of services for MSFWs must be available in an equitable and nondiscriminatory fashion. The addition of the phrase “and nondiscriminatory” is intended to clarify that SWAs must not discriminate against farmworkers either because they are farmworkers or because of any characteristics protected under the nondiscrimination and equal opportunity provisions of WIOA, which are contained in sec. 188 of WIOA, 29 U.S.C. 3248, and the implementing regulations at 29 CFR part 38. The requirements of section 188 of WIOA apply to ES services because the Wagner-Peyser Act Employment Service is a required one-stop partner, and the requirements of section 188 of WIOA apply to all one-stop partners. 29 CFR 38.4(zz).

### **Section 653.101 Provision of services to migrant and seasonal farmworkers.**

The Department proposes to amend § 653.101 by revising the first sentence to clarify that the SWA is the primary recipient of Wagner-Peyser Act funds and, therefore, is the entity responsible for ensuring that ES staff offer MSFWs the full range of career and supportive services. This clarification is proposed because it is ultimately incumbent upon the SWA to ensure ES staff at one-stop centers are carrying out the appropriate duties with their Wagner-Peyser Act funds. The Department also proposes to replace the requirement to consider and be sensitive to the preferences, needs, and skills of individual MSFWs and the availability of job and training opportunities with a requirement that SWAs ensure the one-stop centers tailor ES

services in a way that accounts for individual MSFW preferences, needs, skills, and the availability of job and training opportunities, so that MSFWs are reasonably able to participate in the ES. This proposed change strengthens the requirement to tailor services to the individualized needs of MSFWs. The change also would make the requirement applicable to the SWA to ensure the one-stop centers comply, to align with the SWA's position as the direct recipient of ES funds.

#### **Section 653.102 Job information**

The Department proposes to revise the second sentence of § 653.102 to clarify that the SWA is the entity responsible for assisting MSFWs to access job order information, for the same rationale as described in the same proposed change for § 653.101. The Department's proposed language also clarifies that the requirement applies to ES staff at one-stop centers because the scope of part 653 relates to the ES services program, not all one-stop partner programs. The Department also proposes to remove the word "adequate" as a modifier to the phrase "assistance to MSFWs." The Department has observed that States' interpretation of what it means to provide adequate assistance varies. Removing the word "adequate" will remove subjectivity and clarify that a SWA meets its obligation to assist MSFWs by complying with the requirements in parts 653 and 658.

The Department also proposes to remove the final sentence of § 653.102, which stated that in designated significant MSFW multilingual offices, assistance with accessing job order information must be provided to MSFWs in their native language whenever requested or necessary. The Department proposes to remove this sentence to align language access requirements in the ES regulations with those required by WIOA sec. 188 and its implementing regulations at 29 CFR part 38. Language access requirements are not limited to designated multilingual MSFW one-stop centers, but rather, they apply to LEP individuals regardless of through which office they seek ES services. The existing requirement was written into the regulations in the early 1980s, well before the language access requirements were codified at 29 CFR part 38. Removing the existing requirement, which specifically applies to designated

multilingual MSFW one-stop centers, and adding a reference to the broader language access requirements at § 653.103(b) (described in the following section) is intended to strengthen language access for all LEP individuals. This change also aligns with the proposal to remove the definition for *multilingual MSFW one-stop centers* from § 651.10. Accordingly, the Department proposes to add a broader language access requirement to § 653.103, as described in the following section.

**Section 653.103 Process for migrant and seasonal farmworkers to participate in workforce development.**

The Department proposes to make several revisions to § 653.103. In paragraph (a), the Department proposes to change “one-stop center” to “ES office.” This change clarifies that the requirement applies to ES staff because part 653 applies to the ES services program, not all one-stop partner programs. In addition to the existing requirement to determine whether *participants*, as defined at § 651.10, are MSFWs, the Department proposes to require that ES offices must determine whether *reportable individuals*, also defined at that section, are MSFWs. This proposed change will help ES staff identify all individuals who engage in ES services who are MSFWs, and not limit that assessment to participants only. With this information, SWAs will be able to better understand the number of MSFWs who engage in the ES and the degree of their engagement. This information is important for SWAs and SMAs to have so that they may understand the full scope of who accesses particular services for the purposes of determining whether services are being provided to MSFWs on an equitable basis. For example, by having the number of MSFW reportable individuals, the SWAs and SMA can analyze situations where there may be large numbers of MSFW reportable individuals but very few or no MSFW participants, in proportions far different than other populations. Such scenarios may indicate that ES services are not being provided to MSFWs in a way that is tailored to individual MSFW preferences, needs, skills, and the availability of job and training opportunities, so that MSFWs are reasonably able to participate in the ES, as required by the proposed § 653.101.

In § 653.103(b), the Department proposes to replace the existing provision requiring all SWAs to ensure that MSFWs who are English-language learners receive, free of charge, the language assistance necessary to afford them meaningful access to the programs, services, and information offered by the one-stop centers with a new provision requiring all SWAs to comply with the language access and assistance requirements at 29 CFR 38.9 with regard to all LEP individuals, including MSFWs who are LEP individuals, as defined at 29 CFR 38.4(hh). This compliance includes ensuring ES staff comply with these language access and assistance requirements. This proposed change aligns the language access requirements for MSFWs with those requirements identified for all LEP individuals pursuant to 29 CFR 38.9 and helps ensure LEP individuals have meaningful access to the ES.

Due to this proposed change, the Department proposes corresponding edits throughout the ES regulations to ensure that all language access requirements align with 29 CFR 38.9. This is important for several reasons. First, 29 CFR 38.9 is part of WIOA sec. 188's prohibition on discrimination on the basis of national origin, including limited English proficiency. Maintaining separate language access requirements could create confusion about which standard should apply. Second, the proposed change reduces duplication because the standards at 29 CFR 38.9 already cover the language access requirements provided in the ES regulations. Third, aligning the ES regulations with 29 CFR 38.9 ensures broader language access protections for LEP farmworkers than those in the existing ES regulations.

Lastly, in § 653.103(c), the Department proposes to remove the requirement that one-stop centers must provide MSFWs a list of available career and supportive services "in their native language." This proposed change would make the provision consistent with the broader proposed revisions to language access requirements throughout all parts to ensure they align with 29 CFR 38.9.

#### **Section 653.107 Outreach responsibilities and Agricultural Outreach Plan.**

The Department proposes to revise the section heading in § 653.107 to read “Outreach responsibilities and Agricultural Outreach Plan” to provide greater clarity.

The Department proposes to revise § 653.107(a)(1) in several ways. First, the Department proposes to move to § 653.107(a)(4) the sentence that explains each SWA must provide an adequate number of outreach staff to conduct MSFW outreach in their service areas. The regulation at paragraph (a)(4) details how many outreach staff a SWA must provide and explains what it means to provide an adequate number of outreach staff. Therefore, the previously quoted language from § 653.107(a)(1) more logically fits in § 653.107(a)(4), where it provides clarity regarding what adequate means. The result of this change is that the first sentence of this section now requires that the SWA ensure that outreach staff fulfill the outreach responsibilities described in paragraph (b) of this section on an ongoing basis. The Department proposes to add that outreach staff must conduct outreach on an ongoing basis to clarify that outreach activities in all States must occur year-round. As described at 20 CFR 653.107(a)(4), in significant MSFW States, there must be full-time, year-round outreach staff and in the remainder of the States there must be year-round part-time outreach staff. This change is proposed to clarify that all States must have some degree of outreach at all times.

Second, the Department proposes to revise the sentence that provides SWA Administrators must ensure SMAs and outreach staff coordinate their outreach efforts with WIOA title I sec. 167 grantees by replacing “their outreach efforts” with the word “activities.” This change is proposed to correct frequent misunderstandings by SWAs, where SWAs believe coordinating their outreach efforts means that other organizations such as National Farmworker Jobs Program (NFJP) grantees may conduct outreach on behalf of the SWA and that the NFJP grantees’ outreach is sufficient to satisfy the SWA’s outreach obligations. Using the word “activities” helps clarify that SWAs must coordinate their activities with NFJP grantees (i.e., work together to strengthen their respective services) but that NFJP grantee outreach is not a substitute for SWA outreach obligations. To further clarify this point, the Department proposes



to add to § 653.107(a)(1) a sentence explaining that WIOA title I sec. 167 grantees' activities involving MSFWs does not substitute for SWA outreach responsibilities. This clarification is important because NFJP staff are not obligated to provide the same information or services to MSFWs as SWA outreach staff must provide, nor are they monitored by the SMA to ensure services are compliant with ES regulations.

At § 653.107(a)(2)(i), the Department proposes a technical edit to change the period after "MSFWs" to a semicolon and adding the word "and" to clarify that as part of their outreach, SWAs must ensure outreach staff satisfy both paragraphs (i) and (ii), which follow.

In § 653.107(a)(2)(ii), the Department proposes to revise the requirement that SWAs must ensure outreach staff conduct thorough outreach efforts with extensive follow-up activities in supply States by replacing "in supply States" with "identified at § 653.107(b)(5)." This change is proposed because SWAs must ensure outreach staff are conducting thorough outreach efforts with extensive follow-up activities in all States—not only in supply States. This proposed revision does not increase the outreach burden on non-supply States because all States must already comply with all applicable outreach provisions identified at § 653.107.

The Department proposes several revisions to § 653.107(a)(3). First, the Department proposes to revise the language and structure of the paragraph. The Department proposes to replace "For purposes of providing and assigning outreach staff to conduct outreach duties, and to facilitate the delivery of employment services tailored to the special needs of MSFWs. . . ." with "When hiring or assigning outreach staff." This change would operationalize the proposed State merit-staffing requirement for outreach workers. The existing regulatory text permits SWAs the flexibility to provide outreach staff in several ways, including by subcontracting staff. With this proposed change, the Department is making clear that the SWA is responsible for directly hiring outreach staff who must be State merit staff because the definition of outreach staff refers to ES staff, who must be State merit staff.

The Department has observed that SWAs commonly assign existing staff to fill outreach staff vacancies, without seeking qualified candidates who speak the language of a significant proportion of the State MSFW population, are from MSFW backgrounds, or have substantial work experience in farmworker activities. The proposed revision is also intended to clarify that SWAs must seek to hire for or assign to outreach staff positions, and put a strong emphasis on hiring or assigning, individuals who speak the language of a significant proportion of the State MSFW population and who either are from MSFW backgrounds or have substantial work experience in farmworker activities. Several revisions impact how a State staffs outreach responsibilities. Changes at 653.107(a) require outreach to be ongoing, changes at 653.107(a)(3) strengthen hiring requirements, and changes at 653.107(a)(4) clarify that full-time outreach work means devoting 100% of their time to outreach. Together, States will be unlikely to be able to fulfill these responsibilities unless they hire staff specifically for outreach. While States can assign outreach responsibilities to existing qualified staff, such staff in significant MSFW States must then devote 100% of their time to outreach, not merely add outreach to other responsibilities. For non-significant MSFW States, outreach staff must devote full time in peak season and part time in non-peak season to outreach.

The Department proposes to maintain the language in § 653.107(a)(3)(i) that SWAs must seek qualified candidates who speak the language of a significant proportion of the State MSFW population. But to strengthen the existing requirement, the Department proposes to add that the SWA must not only seek but also put a strong emphasis on hiring qualified candidates. This language is proposed to increase the likelihood that SWAs will hire candidates with the criteria described in § 653.107(a)(3)(i), instead of simply seeking candidates whom they never hire. To further increase the likelihood that SWAs hire candidates who meet the required criteria, the Department proposes to add a new paragraph at § 653.107(a)(3)(ii) requiring the SWA to inform farmworker organizations and other organizations with expertise concerning MSFWs of outreach staff job openings and encourage them to refer qualified applicants to apply. These additions are

proposed to expand the applicant pool for outreach staff positions to include individuals who have the knowledge, skills, and abilities to meet the unique needs of farmworkers. The proposed paragraph also makes requirements for hiring outreach staff consistent with the requirements for appointing an SMA under § 653.108(b). For the SMA position, the SWA is required to inform farmworker organizations and other organizations with expertise concerning MSFWs of the opening and encourage them to refer qualified applicants to apply. As discussed in this section, this requirement helps SWAs expand the applicant pool for SMAs to help the SWA choose from a larger selection of qualified applicants, and the same reasoning applies to outreach staff.

The Department proposes to amend § 653.107(a)(4) by adding the sentence that the Department proposes to remove from § 653.107(a)(1), which provides that each SWA must provide an adequate number of outreach staff to conduct MSFW outreach in their service areas. However, the Department proposes to replace “in their service areas” with “in each area of the State.” This change will clarify that SWAs must provide outreach in all areas of the State where there are farmworkers, not only in certain service areas. This change would make the expectation to cover the full State clear. The Department also proposes to replace “provide” with “employ” and add to the end of the sentence language making clear that an adequate number of outreach staff are needed to contact a majority of MSFWs in all of the SWA’s service areas annually. These additions are proposed to clarify what it means to employ an “adequate number of outreach staff,” all of whom must be State merit staff. Making this determination on an annual basis helps align the assessment of staffing levels with the reporting required in the SMA’s Annual Summary.

The Department further proposes to revise the sentence requiring that in the 20 States with the highest estimated year-round MSFW activity, as identified in guidance issued by the Secretary, there must be full-time, year-round outreach staff to conduct outreach duties. Specifically, the Department proposes to replace “in guidance issued by the Secretary” with “as

identified by the Department.” This revision is necessary to conform to guidance issued by the Department.

The Department also proposes to amend § 653.107(a)(4) to add a sentence clarifying what it means to have full-time outreach staff. The proposed sentence explains that full-time means each individual outreach staff person must spend 100 percent of their time on the outreach responsibilities described at § 653.107(b). This requirement is important because having each outreach staff person engage in outreach on a full-time basis gives that person more time to establish a positive working relationship with MSFWs and agricultural employers in their service area. This can be helpful for building trust and engaging in informal resolution of complaints and apparent violations. It is also necessary so that outreach staff are fully available to provide the level of ES and follow-up activities that these regulations describe. The Department proposes to keep the existing requirements that, in the 20 States with the highest estimated year-round MSFW activity, as identified by the Department and defined as significant MSFW States at § 651.10, there must be full-time, year-round outreach staff to conduct outreach duties. In the remainder of the States, there must be year-round part-time outreach staff, and during periods of the highest MSFW activity, there must be full-time outreach staff. This means that States that are not significant MSFW States may allow outreach staff to conduct other activities that promote farmworker safety, including housing inspections, when they are not in peak harvest season. If outreach staff in States that are not significant MSFW States have additional time available after fulfilling their required outreach responsibilities, those States may leverage outreach staff members, required to be State merit staff under this proposal, to help support other critical functions, such as UI.

Finally, the Department proposes to further clarify outreach staffing requirements by adding a new sentence in § 653.107(a)(4) stating that staffing levels must align with and be supported by information about the estimated number of farmworkers in the State and the farmworker activity in the State as demonstrated in the State’s Agricultural Outreach Plan (AOP)

pursuant to § 653.107(d). This language will help SWAs understand that the number of full-time or part-time outreach staff must be determined by information provided in the State's AOP. These revisions will give the State a clear method to identify what staffing levels are appropriate.

The Department also proposes to revise § 653.107(b) by adding that outreach staff responsibilities include the activities identified in § 653.107(b)(1) through (11). This addition clarifies the specific activities included in outreach staff responsibilities. The proposed regulatory text also replaces a colon with a period, which helps the construction of the sentence and its relationship to the following paragraphs.

The Department proposes two revisions to § 653.107(b)(1). First, the Department proposes to replace "Explaining" with "Outreach staff must explain" to align with the updated construction of the sentence whereby paragraph (b) is proposed to be a sentence ending in a period and not a colon, making the following paragraphs full sentences. Second, the Department proposes to remove the explicit requirement for the information that outreach staff must convey to be in a language readily understood by them, because proposed § 653.103(b) would already require this information to be in languages other than English for LEP individuals as provided under 29 CFR 38.9. This proposed change conforms with other proposed changes to language access requirements throughout parts 651, 652, 653, and 658 where the Department seeks to align these requirements with those identified at 29 CFR 38.9.

The Department proposes to revise § 653.107(b)(3) to replace "outreach workers" with "outreach staff" to align with the proposed definition of outreach staff at § 651.10. The Department proposes the same revision to paragraph (b)(4) and to remove the word "the" before "outreach staff" for clarity. These changes are necessary to align with the proposed State merit-staffing requirements for ES staff. Because § 651.10 defines outreach staff as ES staff with responsibilities described at § 653.107(b), the proposed State merit-staffing requirement applies to outreach staff.

The Department proposes several revisions to § 653.107(b)(7). First, the Department proposes to replace the reference to outreach staff being trained in “local office” procedures with “one-stop center” procedures to align with the *ES office* definition at proposed § 651.10. Second, the Department proposes to require SWAs to provide outreach staff with training on sexual coercion, assault, and human trafficking, alongside the existing requirement to provide sexual harassment training. The current regulation gives SWAs the option of providing training on sexual coercion, assault, and human trafficking. The proposed regulation would require training in these areas due to an increased need to combat these issues in the field. These additional topics are of importance to the Department, and this proposal is driven by the increased frequency of complaints and apparent violations SWAs have processed and information from organizations the Department has partnered with regarding these issues. The focus remains for outreach staff to be able to identify and refer cases to the appropriate enforcement agencies. Third, the Department proposes to replace the requirement for outreach staff to be trained in the procedure for informal resolution of complaints with a requirement for them to be trained in the Complaint System procedures (at part 658, subpart E) and be aware of the local, State, regional, and national enforcement agencies that would be appropriate to receive referrals. This change is necessary so that outreach staff are trained in the full Complaint System procedures, which include informal resolution.

The Department proposes to revise § 653.107(b)(8) by changing the record retention requirement from 2 years to 3 years to align with the Office of Management and Budget (OMB) Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal awards to non-Federal Entities (Uniform Guidance) record retention requirements at 2 CFR 200.334. The Uniform Guidance applies to all grants funded by ETA. It is important to ensure record retention requirements are consistent across all ETA grantee activities, including for the Monitor Advocate System which is funded by the Wagner-Peyser Act grant.

The Department proposes to make a technical edit to § 653.107(b)(11) by replacing the reference to significant MSFW “local offices” with “significant MSFW one-stop centers” to align with the defined term in § 651.10. The Department also proposes to add a requirement that the outreach activities must align with and be supported by information provided in the State’s AOP pursuant to § 653.107(d).

The Department proposes to replace the requirement in § 653.107(d)(2)(ii) for SWAs in the AOP to provide an assessment of available outreach resources with a requirement that SWAs explain the materials, tools, and resources the State will use for outreach. The proposed revision clarifies the requirement to assist SWAs to better understand what information must be reported and that SWAs should provide more detailed and better explanations of how the SWA intends to use those resources.

The Department proposes to amend § 653.107(d)(2)(iii) to require SWAs to describe their activities to contact MSFWs who are not being reached by the normal intake activities conducted by the one-stop centers. The proposed regulation also would require the SWA to include the number of full-time and part-time outreach staff in the State and to demonstrate that there is sufficient outreach staff to contact a majority of MSFWs in all the State’s service areas annually. The Department is proposing these changes to strengthen the description in the AOP of how the SWA will contact MSFWs adequately, consistent with the proposed revision to § 653.107(a)(4) for States to employ sufficient outreach staff to contact a majority of MSFWs in all the State’s service areas annually. It is also helpful for RMAs to understand staffing levels to assess whether the State can meet the SWAs outreach requirements.

The Department proposes to clarify that § 653.107(d)(2)(iv) requires the AOP to describe activities planned for providing the full range of ES services to the agricultural community, instead of “employment and training services.” This change is necessary to explain which specific services the AOP must describe, which is specific to ES services and do not include all workforce development system activities.

The Department proposes to replace the requirement at § 653.107(d)(2)(v) that the AOP must provide an assurance that the SWA is complying with the requirements under § 653.111 if the State has significant MSFW one-stop centers with a requirement that the AOP must include a description of how the SWA intends to provide ES staff in significant MSFW one-stop centers in accordance with § 653.111. This proposed change is intended to help the SMAs, RMAs, and the NMA assess whether SWAs will have the appropriate staffing structure to meet the unique needs of farmworkers.

The Department proposes to amend § 653.107(d)(4) to clarify that the AOP must be submitted in accordance with § 653.107(d)(1) instead of (d), as currently written. Paragraph (d)(1) is the accurate reference that explains the SWA's responsibility to develop the AOP as a part of the Unified or Combined State Plan.

The Department proposes two revisions at § 653.107(d)(5). First, the Department proposes a technical edit to change the reference from § 653.108(s) to § 653.108(u) due to restructuring paragraphs at § 653.108. Second, the Department proposes to replace "its goals" with "the objectives." Referring to "the objectives" is more accurate because the Department does not ask SWAs to provide specific goals in the AOP, rather SWAs identify various objectives.

#### **Section 653.108 State Workforce Agency and State Monitor Advocate responsibilities.**

Section 653.108 governs what a SWA and SMA must do to monitor a State's provision of ES services to MSFWs. As explained subsequently, the Department proposes several revisions to this section to strengthen the role of the SMA and to enhance the monitoring activities that SMAs perform.

The Department proposes to revise § 653.108(a) to explicitly prohibit the State Administrator or ES staff from retaliating against an SMA for performing the monitoring activities that are required by this section. Specifically, the Department proposes to add at the end of § 653.108(a) a requirement that the State Administrator and ES staff must not retaliate



against staff, including the SMA, for self-monitoring or raising any issues or concerns regarding non-compliance with the ES regulations. The addition of this sentence will emphasize the Department's intolerance for retaliation against SMAs for conducting their duties and encourage and protect internal disclosures and discussions about noncompliance.

The Department proposes to revise § 653.108(b), which prescribes criteria that States must consider when appointing an SMA, to require that SWAs not only seek but also put a strong emphasis on hiring qualified candidates for the SMA position who meet one or more of the criteria listed in paragraphs (b)(1) through (3). While the current regulations already require SWAs to "seek" qualified candidates who meet these criteria, the Department proposes to require that SWAs "put a strong emphasis on hiring" such candidates to increase the likelihood that SWAs hire SMAs who meet one or more of these criteria, and not simply seek such individuals. In the Department's view, it is important for SMAs to meet one or more of these existing criteria, so that SMAs understand and have appropriate skills to assess whether the SWA is providing adequate services to MSFWs.

The Department also proposes to remove the requirement in § 653.108(b) that the SMA be a SWA official because the proposed edits to § 651.10 remove *SWA official* as a defined term. The Department proposes to revise § 653.108(c) to require that the SMA be an ES staff employee. As explained previously in this document, the Department is proposing to reinstate the longstanding State merit-staffing requirement that was in effect prior to the 2020 Final Rule. One of the ways in which the Department proposes to effectuate this proposal is to remove the definition of *SWA official* in § 651.10 and to revise the definition of *ES staff* in § 651.10 to mean State government personnel who are employed according to the merit-system principles described in 5 CFR part 900, subpart F (Standards for a Merit System of Personnel Administration) and who are funded, in whole or in part, by Wagner-Peyser Act funds. As relevant here, the Department proposes to remove the requirement in § 653.108(b) for the SMA to be a *SWA Official* and to revise § 653.108(c) to require that the SMA be a senior level *ES staff*

employee. While the specifics of this proposal are discussed in detail subsequently, the Department notes here that the term *ES staff* is intended to clarify that the proposed regulation would require the SMA to be not only a State employee, but a State merit-staff employee. This proposal, if finalized, will lead to more consistent delivery of services to ES customers. As a universal access system, it is vital that the ES be administered consistently across all States and that services are delivered effectively and equitably. Returning to the requirement that ES services be provided by State merit staff would help ensure that ES services are delivered by knowledgeable personnel in a manner consistent from State to State and allow for accountability that other staffing models cannot duplicate.

The Department additionally proposes several revisions to § 653.108(c) to strengthen the status of the SMA, as many SMAs have reported difficulty in their ability to fully carry out their duties due to insufficient status within the SWA. With these proposed changes, the Department seeks to align the status of the SMA with that of the Equal Opportunity (EO) Officer because the SMA's role is similar to the EO Officer's role. Both are charged with ensuring compliance with regulations put in place to ensure individuals have meaningful access to services and equal employment opportunities. In 2016, the DOL Civil Rights Center (CRC) expanded on previous requirements specifying the authority and status that EO Officers must have to ensure they can most efficiently and effectively carry out the recipients' nondiscrimination obligations. *See generally*, 29 CFR 38.28 through 38.33.<sup>11</sup> According to CRC's NPRM,<sup>12</sup> the changes were intended to address feedback from EO Officers that they lacked sufficient authority to carry out their responsibilities. Similarly, in returning to merit-staffing in this rulemaking, the Department proposes to more specifically describe the required status of the SMA. Prior to the 2020 Final Rule, § 653.108(c) required the SMA to have direct, personal access, when necessary, to the

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<sup>11</sup> *Implementation of the Nondiscrimination and Equal Opportunity Provisions of the Workforce Innovation and Opportunity Act; Final Rule*, 81 FR 87130, 87176-87179 (Dec. 2, 2016).

<sup>12</sup> *Implementation of the Nondiscrimination and Equal Opportunity Provisions of the Workforce Innovation and Opportunity Act; Notice of Proposed Rulemaking*, 81 FR 4494, 4516-4517 (Jan. 26, 2016).

State Administrator, and status and compensation comparable to other State positions assigned similar levels of tasks, complexity, and responsibility. By requiring the SMA to be a senior-level ES staff employee who reports directly to the State Administrator or their designee, this proposed rule would provide concrete ways to ensure that the SMA has status equivalent to what § 653.108(c) required prior to the 2020 Final Rule. This specification will also address feedback from many SMAs, who have reported that they lack sufficient authority to carry out their duties identified in the ES regulations. This change would allow SMAs to more efficiently and effectively carry out the SMA's obligation to monitor whether the SWA is serving farmworkers in a way that is qualitatively equivalent and quantitatively proportionate to all other job seekers.

To achieve these results, the Department proposes to strengthen the status of the SMA in several ways. First, the Department proposes at § 653.108(c) to create new paragraphs (c)(1) through (3). In paragraph (c)(1), the Department proposes to require that the SMA be a senior-level ES staff employee. As previously explained, enhancing the status of the SMA by making the SMA a senior-level official will allow the SMA to have the authority necessary to more effectively carry out their duties. Second, proposed paragraph (c)(2) requires the SMA to report directly to the State Administrator or their designee such as a director or other appropriately titled official in the State Administrator's office, who has the authority to act on behalf of the State Administrator. While current regulations require the SMA to have direct access to the State Administrator, in practice this requirement has been insufficient for the SMA to have the authority necessary to carry out their duties and to communicate with the State Administrator, when the SMA finds it necessary. Reporting directly to the State Administrator will provide more direct access to and interaction with State leadership for the SMAs to carry out their duties. The Department proposes to make clear that if the State Administrator chooses to have the SMA report to a designee with the authority of the State Administrator, that person cannot be the individual who has direct program oversight of the ES. Though the State Administrator has overall responsibility for operation and compliance of the ES, the State Administrator is removed

from the daily management of program operations. The proposed change would help the SMA avoid challenges that may exist if they were to report to an individual who has direct ES program oversight, for example the ES director, because in that case the SMA would be responsible to monitor compliance with decisions their direct supervisor made or was otherwise directly responsible for. Third, proposed paragraph (c)(3) would require that the SMA have the knowledge, skills, and abilities necessary to fulfill the responsibilities as described in this subpart. This proposed revision is intended to clarify the qualifications that SMAs must have to effectively perform all required SMA functions.

The Department does not anticipate that these revisions to § 653.108(c) will cause undue burden on the SWA. The State Administrator may restructure the current SMA position to meet the requirements of part 653. Moreover, the requirement that State Administrators appoint an SMA is longstanding, and several States already staff their SMA position as described in the proposed revisions (i.e., where the SMA is a senior-level ES staff member who reports directly to the State Administrator or their designee). The proposed revisions will ensure all SWAs meet these same standards. The Department recognizes it may take States with SMA positions that do not already meet these standards some time to implement the standards. Accordingly, the Department seeks comments on whether it should provide a transition period to allow States additional time to come into compliance with the revised standards, and if so, the appropriate duration of such a period.

The Department additionally proposes to enhance the authority of the SMA through several revisions to § 653.108(d) and the addition of paragraph (e). Specifically, the Department proposes to revise § 653.108(d) to require that the SMA have sufficient authority, staff, resources, and access to top management to monitor compliance with the ES regulations. While requiring that the SMA have sufficient staff necessary to fulfill effectively all the duties set forth in the subpart is not a new requirement, the Department seeks to clarify that the SMA must also have sufficient authority, resources, and access to top management to carry out their duties. The

Department also proposes to specify that the number of ES staff positions required by this section must be assigned to the SMA. The Department proposes to clarify that these positions specifically relate to ES staff assigned to the SMA to help the SMA carry out the duties set forth in § 653.108, and that they may not be assigned conflicting roles to perform any of outreach responsibilities, ARS processing, or complaint processing.

The Department proposes a new paragraph (e) to specify that no State may dedicate less than full-time staffing for the SMA position unless the RA, with input from the RMA, provides written approval. The proposed paragraph would maintain the requirement currently in paragraph (d) for any State proposing less than full-time staffing to demonstrate that all SMA functions can be effectively performed with part-time staffing, but would require the State to make this demonstration to the RMA in addition to the RA. This proposed revision clarifies that the RA must approve the exception to the requirement for a full-time SMA and that the SWA must demonstrate that part-time staffing will not affect the needs of and service delivery to MSFWs in the State and that the SMA will be able to effectively fulfill their duties while working on a part-time basis. The Department anticipates that a SWA would provide both qualitative and quantitative data and information in making its request, and it plans to provide States guidance on the factors that the RA and RMA will consider when States request part-time staffing for the SMA position.

The Department proposes to revise § 653.108(e) (now proposed § 653.108(f)) by removing the requirement for the SMA to attend, within the first 3 months of their tenure, a training session conducted by the RMA. Instead, the Department proposes to require all SMAs and their staff to attend training session(s) offered by the RMAs, the NMA, and their team, and those necessary to maintain competency and enhance SMA's understanding of the unique needs of farmworkers. The Department proposes that such trainings must include those identified by the applicable RMA and may include those offered by the Occupational Safety and Health Administration (OSHA), WHD, the Equal Employment Opportunity Commission (EEOC), the

Immigrant and Employee Rights Section of the Department of Justice's Civil Rights Division, CRC, and other organizations offering farmworker-related information. These revisions are proposed to clarify the SMA's responsibility to attend necessary training and keep apprised of issues affecting MSFWs to effectively carry out their duties as the SMA. Historically, there have been numerous cases where SMAs did not or could not attend trainings offered by the RMAs or NMA. This provision seeks to clarify the SMA's responsibility to attend the trainings and increase SMA training opportunities and attendance.

The Department proposes to redesignate § 653.108(f) and (g) due to updated sequencing.

The Department proposes to revise § 653.108(g)(1) (now proposed to be § 653.108(h)(1)) to specify important elements of the ongoing review that the SMA must conduct under this paragraph. In particular, new proposed subordinate paragraphs (h)(1)(i) through (iii) would require the SMA to conduct an ongoing review of the delivery of services and protections afforded by the ES regulations to MSFWs by the SWA and ES offices, including: (i) monitoring compliance with § 653.111; (ii) monitoring the ES services that the SWA and one-stop center provide to MSFWs to assess whether they are qualitatively equivalent and quantitatively proportionate to the services the SWA and one-stop centers provide to non-MSFWs; and (iii) reviewing the appropriateness of informal resolution of complaints and apparent violations as documented in the complaint logs. The requirements in proposed paragraphs (h)(1)(i) and (iii) currently exist at § 653.108(g)(1) and the minor proposed revisions to these requirements are intended only to clarify the existing requirements. Specifically, in paragraph (h)(1)(i), the Department proposes to add a requirement that ongoing reviews include monitoring compliance with § 653.111 to highlight the importance of significant MSFW one-stop centers in staffing appropriately to meet the unique needs of farmworkers. The Department proposes to add § 653.108(h)(1)(ii) to clarify that SMAs are required to monitor whether the ES services provided to MSFWs are qualitatively equivalent and quantitatively proportionate to the services provided to non-MSFWs. Finally, the Department proposes to clarify in paragraph (h)(1)(iii) that

SMAAs must review informal resolution of complaints and apparent violations to ensure that resolution of matters is occurring consistent with the requirements in part 658, subpart E.

The Department proposes to redesignate § 653.108(g)(1) as § 653.108(h)(2) and revise the regulatory text by replacing “local offices” with “ES offices” to align with the defined term for ES office in § 651.10. The Department further proposes to revise the paragraph by clarifying that the SMA, if warranted, can notify the SWA of the corrective action(s) necessary to address the deficiencies described earlier in the paragraph, and that the corrective action plan must comply with the requirements at proposed paragraph (h)(3)(v). This revision is intended to clarify that the corrective action plan is the method by which a SWA or ES office achieves compliance with the SMA’s compliance findings. The existing regulatory text provides that the SMA may request a corrective action plan, which does not appear to require the SWA or ES office to take corrective action. The proposed revision clarifies that SMAs assure compliance by documenting noncompliance, describing the corrective actions necessary for the SWA to come into compliance, reviewing the corrective action plan that the SWA or ES office develops to implement the identified corrective action(s), documenting compliance or lack of compliance with the corrective action plan, and reporting to ETA any noncompliance. Once noncompliance is identified, SWAs have a responsibility to address it, as described in part 653, subpart D.

The Department proposes to redesignate § 653.108(g)(2) to be § 653.108(h)(3) and to clarify that SMAs must conduct onsite reviews of one-stop centers regardless of whether or not the one-stop center is designated as a significant MSFW one-stop center. This is an important clarification because SMAs often mistakenly think they only need to review significant MSFW one-stop centers. The Department also proposes a clarifying edit to this paragraph by adding that the reviews must follow procedures set forth in paragraphs (h)(3)(i) through (vii) of this section. This is proposed to help the structure of paragraph (h)(3) and its subordinate paragraphs. Correspondingly, current paragraph (g)(2)(ii), which is proposed to be new paragraph (h)(3)(ii), contains proposed clarifying edits, which state “The SMA must ensure. . .” instead of the

existing “Ensure. . . .” Finally, the Department proposes to specify that the complaint logs that the SMA must review pursuant to § 653.108(g)(2)(i)(D) (proposed § 653.108(h)(3)(i)(D)) are the complaint logs required by the regulations under part 658 of this chapter.

At § 653.108(g)(2)(iv), which is proposed § 653.108(h)(3)(iv), the Department proposes a few revisions. First, the Department proposes to add a comma after “After each review,” for technical clarity and readability. Next, the Department proposes to specify that the SMA’s conclusions include findings and areas of concern by adding “including findings and areas of concern,” after “The conclusions.” The Department proposes this revision to make the SMA’s monitoring align with the ETA monitoring format, which § 653.108(g)(3)(ii) requires the SMA use as a guideline. The Department also proposes to add a requirement that the SMA’s report be sent directly to the State Administrator.

The Department also proposes to revise current § 653.108(g)(2)(v) (proposed 653.108(h)(3)(v)) in several ways. First, the Department proposes to add that the SMA’s report must include the corrective action(s) required. Second, the Department proposes to specify that, to resolve the findings, the ES Office Manager or other appropriate ES staff must develop and propose a written corrective action plan. These changes conform the SMA’s monitoring process with the ETA monitoring format, which requires the monitor to identify the corrective actions required. The Department proposes to add “the” before “actions,” as a technical edit. The Department also proposes to revise the third sentence to clarify that the corrective action plan should be designed to bring the ES office into compliance within 30 days, and to specify that where a plan is not designed to bring the ES office into compliance within 30 days, the length of and reasons for the expended period must be specifically stated and the plan must specify the major interim steps that the ES office will take to correct the compliance steps identified by the SMA. In other words, only if there is a documented justification for compliance to take longer than 30 days can such efforts be “steps” rather than full compliance. This revision is designed to help ensure SWAs resolve identified compliance issues.



At current § 653.108(g)(2)(vii), which is proposed to be paragraph (h)(3)(vii), the Department proposes to allow the SMA to delegate reviews to their staff instead of “a SWA official” because SMA staff may conduct such reviews under the authority of the SMA. This change will clarify that other persons who conduct reviews on behalf of the SMA must be the SMA’s staff, who should share the same objectives of the SMA, helping ensure that the role of the monitor advocate is effectively carried out. The Department also proposes that the SMA may delegate the reviews whenever the SMA finds such delegation necessary, as opposed to when the State Administrator finds such delegation necessary. This proposed change aligns with the proposal for the SMA to be a senior-level official with greater authority within the SWA. The SMA, therefore, should be empowered to make the determination about whether such delegation is necessary. The Department also proposes to remove the words “and when” from the phrase “if and when” in this paragraph. As such, the proposed paragraph now states that the SMA may delegate the review described in § 653.108(h)(1) to the SMA’s staff, if the SMA finds such delegation necessary, and in such event, the SMA is responsible for and must approve the written report of the review.

The Department proposes to revise § 653.108(g)(3) (proposed paragraph (h)(4)) to ensure all significant MSFW one-stop centers not reviewed onsite by Federal staff are reviewed at least once per year by the SMA or their staff, instead of “a SWA official.” This change is proposed because it is important for these reviews to be conducted by staff who share the SMA’s objectives. As previously noted, the SMA’s staff are responsible to assist the SMA in carrying out the SMA’s duties described at § 653.108.

Paragraph (g)(5), proposed § 653.108(h)(6), currently requires SMAs to review outreach workers’ daily logs and other reports including those showing or reflecting the workers’ activities “on a random basis.” The Department proposes to replace “random” with “regular.” SMAs were confused, at times, about what “random” means and, therefore, how frequently they should be reviewing outreach staff’s logs. Replacing “random” with “regular” is intended to help

clarify the SMA's responsibility that these reviews occur on a regular basis. The frequency of these reviews may vary based on how many outreach staff each SWA has; however, there should be some standard of frequency in each SWA to ensure regular review occurs. For example, in SWAs with one or two outreach staff, it may be possible for the SMA to review outreach logs every month, but in SWAs with many outreach staff, it may be more appropriate to review outreach logs quarterly. The Department also proposes to replace "outreach workers" with "outreach staff" throughout this paragraph to use the defined term at § 651.10.

The Department proposes to revise § 653.108(g)(6), proposed paragraph (h)(7), which currently requires the SMA to write and submit Annual Summaries to the State Administrator with a copy to the RA by adding that a copy of the summary must also be sent to the NMA. This aligns the requirement with paragraph (s) (proposed paragraph (u)) whereby the Annual Summary must also be sent to the NMA. The Department also proposes to remove the last part of the sentence, "as described in paragraph (s) of this section," as it is no longer necessary with the addition of the NMA to this provision.

At § 653.108(h), proposed paragraph (i), the Department proposes to add "as requested by the Regional or National Monitor Advocate," after "The SMA must participate in Federal reviews conducted pursuant to part 658, subpart G, of this chapter." This is proposed to be added to ensure the SMA participates in a way that is helpful and productive for the RMA or NMA. In the past, there have been cases where the SMA either was not permitted or chose not to participate in reviews with the Federal staff. This proposed addition helps ensure the SMA will participate when requested.

The Department proposes to redesignate § 653.108(i) as § 653.108(j). The Department proposes to remove the provision permitting the State Administrator to assign the SMA the responsibility as the Complaint System Representative, and the requirement that the SMA participate in the Complaint System set forth in part 658, subpart E. As explained later in the section of the preamble addressing part 658, subpart E, the Department is proposing to prohibit

SWAs from assigning SMAs responsibility for processing complaints. The Department is proposing to remove SMAs from Complaint System processing because this section tasks SMAs with monitoring the Complaint System, and the Department anticipates that SMAs will be more objective in monitoring the Complaint System if they are not tasked with monitoring work that they themselves perform. This change would result in greater safeguards for MSFWs within the Complaint System. The Department proposes to make corresponding edits to part 658, subpart E.

The Department proposes to redesignate § 653.108(j) and (k), as a technical edit.

The Department proposes a new provision at proposed § 653.108(m). This provision is proposed to state how the SMA must establish an ongoing liaison with the State-level EO Officer. The Department proposes this addition to enhance equity and inclusion for farmworkers. When SMAs work closely with the State-level EO Officer, the SMA will have a better sense of steps the State is taking to meet its equity requirements pursuant to WIOA sec. 188, and how the SMA can better ensure services are provided equitably for MSFWs. The SMA can also provide information to the State-level EO Officer on patterns in service provision.

The Department proposes to redesignate § 653.108(l) as § 653.108(n), and to make a conforming revision to the cross reference in this paragraph so that the organizations with which the SMA must meet are updated to reflect the organizations described in proposed paragraph (l) and the State-level EO Officer referred to in proposed paragraph (m). This will mean that § 653.108(n) would refer to the paragraphs requiring the SMA to establish an ongoing liaison with NFJP grantees, other organizations serving farmworkers, employers, and employer organizations in the State, and the State-level EO Officer. The Department also proposes to add a requirement that SMAs must communicate freely with these individuals and organizations to enable the SMA to communicate efficiently, so that important information is not delayed due to the SMA needing to get approval to speak with these individuals and groups. This proposed change also conforms with the proposed revisions to the SMA's position as a senior-level staff member, who should have the discretion to communicate, as they find appropriate. In addition,

the Department proposes to remove the requirement that the SMA receive complaints and assist in referrals of alleged violations to enforcement agencies to conform with the proposal to remove the SMA from Complaint System processing, as explained previously.

The Department proposes to redesignate § 653.108(m) as 653.108(o), as a technical edit. The Department also proposes to revise this paragraph to clarify that when the SMA conducts field visits, they must discuss the SWA's provision of ES services and obtain input on the adequacy of those services from MSFWs, crew leaders, and employers, rather than explaining and providing direct employment services and access to other employment-related programs. The purpose of the SMA's field visits is distinct from the direct ES services that outreach staff provide to MSFWs in the field, because the SMA is tasked with assessing how the ES is functioning and whether the SWA can make improvements, as opposed to the direct provision of ES services. This proposed revision helps clarify that SMA field visits are for a different purpose than outreach staff field visits.

The Department proposes to redesignate § 653.108(n) through (p) as § 653.108(o) through (q), as a technical edit.

The Department proposes to redesignate § 653.108(q) as § 653.108(s), as a technical edit. The Department also proposes a technical edit to remove the reference to SWA staff and keep only "ES staff" to align with the proposed definition for *ES staff* at § 651.10. Because SWA staff are included in the proposed definition of ES staff, this will not change the substance of the paragraph. The Department further proposes to simplify the wording of the paragraph by replacing the phrase "Subsequent to" with the word "After."

The Department proposes to redesignate § 653.108(r) and (s) as § 653.108(t) and (u), respectively, as a technical edit.

The Department proposes to redesignate § 653.108(s) as § 653.108(u). Proposed paragraph (u) requires the SMA to prepare an Annual Summary describing how the State provided ES services to MSFWs within the State based on statistical data, reviews, and other

activities. It includes subordinate paragraphs (1) through (11), which identify the various required components of the Annual Summary.

The Department proposes to revise § 653.108(s)(2), proposed § 653.108(u)(2), to conform with proposed edits at § 653.108(c). Specifically, § 653.108(s)(2) currently requires an assurance that the SMA has direct, personal access, whenever they find it necessary, to the State Administrator. Proposed paragraph (u)(2) would require an assurance that the SMA is a senior-level official who reports directly to the State Administrator or the State Administrator's designee as described at § 653.108(c).

The Department proposes to amend § 653.108(s)(3)(i) and (ii), proposed 20 CFR 653.108(u)(3)(i) and (ii), to revise the assurance requested in the SMA's Annual Summary regarding SMA staffing levels. Currently, the Annual Summary requires an assurance that the SMA devotes all of their time to Monitor Advocate functions, or, if the SMA conducts their functions on a part-time basis, an explanation of how the SMA functions are effectively performed with part-time staffing. This paragraph is proposed to be revised in several ways. First, proposed paragraph (u)(3) would begin with a requirement to provide an evaluation of SMA staffing levels, and it would be followed by § 653.108(u)(3)(i) and (ii), which would outline the contents of this evaluation. Specifically, paragraph (u)(3)(i) would require the SMA to assure that they devote all their time to Monitor Advocate functions, or if the SMA has approval under § 653.108(e) to conduct their functions on a part-time basis, an assessment of whether they can perform all their functions effectively on a part-time basis. Paragraph (u)(3)(ii) would additionally require the SMA to assess whether the performance of SMA functions requires increased time by the SMA (if part time) or an increase in the number of ES staff assigned to assist the SMA in the performance of SMA functions, or both. This information will help the RMA and NMA better understand whether the SMA's status as full- or part-time is sufficient for them to carry out their duties, and whether the SMA requires additional staff to perform all the functions required by this section. The previous requirement for an assurance did

not provide the depth, context, or explanation necessary for the State Administrator or the Department to assess whether the SMA has adequate staffing.

The Department proposes to revise § 653.108(s)(4) (iii), proposed § 653.108(u)(4)(iii), to clarify that the summary of any technical assistance the SMA provided must include any technical assistance provided to outreach staff, in addition to technical assistance provided to the SWA and ES offices. While outreach staff are considered part of the SWA, the Department proposes to clarify that the summary must specifically identify the technical assistance that the SMA provided to outreach staff, so that the State Administrator and the Department may better assess whether outreach staff are obtaining the knowledge and resources necessary to fulfill their duties.

The Department proposes to revise § 653.108(s)(5), proposed § 653.108(u)(5), to specify that when the SMA summarizes the outreach efforts undertaken by all significant and non-significant MSFW ES offices in the State, the SMA must include the results of those efforts and analyze whether the outreach levels and results were adequate. Through this analysis, the Department would like to understand whether the SMA believes the SWA has allocated sufficient outreach staff and resources to complete the outreach duties identified at § 653.107, including whether outreach staff are able to reach the majority of MSFWs in the State.

The Department proposes to revise § 653.108(s)(7), proposed § 653.108(u)(7), by adding that in addition to providing a summary of how the SMA is working with WIOA sec. 167 NFJP grantees, the SMA must provide a summary of how they are working with the State-level EO Officer. This revision aligns with the proposed requirement at proposed § 653.108(m) for the SMA to establish an ongoing liaison with the State-level EO Officer. The inclusion of this information in the Annual Summary will allow State Administrators, RMAs, and the NMA to review what the SMA is doing to fulfill the new liaison requirement (e.g., how frequently are they meeting with the State-level EO Officer, the type of information that is shared, any best practices or lessons learned).

The Department proposes to revise § 653.108(s)(10), proposed § 653.108(u)(10), which currently requires the SMA to provide a summary of activities related to the AOP and an explanation of how those activities helped the State reach the goals and objectives described in the AOP. At the end of the 4-year AOP cycle, the summary must include a synopsis of the SWA's achievements over the previous 4 years to accomplish the goals set forth in the AOP, and a description of the goals which were not achieved and the steps the SWA will take to address those deficiencies. The Department proposes to replace the requirement to explain "how" the activities helped the State reach the goals and objectives described in the AOP with a requirement to explain "whether" the activities helped the State reach the objectives described in the AOP. This revision better reflects the information that the Department seeks (i.e., whether these activities helped the State meet its objectives). The Department also proposes to remove "goals" from the first sentence and to replace "goals" with "objectives" in the second sentence, because the Department does not ask States to identify specific goals in the AOP. Rather, the SWA provides objectives in its AOP, and the SMA's Annual Summary should explain whether the activities that the SWA performed that year are meeting the identified objectives.

The Department proposes two clarifying edits to § 653.108(s)(11), proposed § 653.108(u)(11). First, the Department proposes to replace significant MSFW "ES offices" with significant MSFW "one-stop centers" to align with the defined term at § 651.10. Second, the Department proposes to revise the requirement for the SMA to summarize the State's efforts to provide ES staff in accordance with § 653.111, to require the SMA to summarize the State's efforts to comply with § 653.111. The Department anticipates that this change will put greater emphasis on compliance with the requirements of § 653.111.

#### **Section 653.109 Data collection and performance accountability measures.**

Section 653.109 specifies data collection and performance accountability measures specific to MSFWs. The Department proposes to make several revisions to this section.

First, the Department proposes to add a new data collection requirement in paragraph (b) of this section. Specifically, the Department proposes to add § 653.109(b)(10), which would require SWAs to collect the number of reportable individuals and participants who are MSFWs. The Department anticipates that access to this information will help the SWAs and the Department to better understand how many MSFWs are engaging with the ES, either as reportable individuals or participants, and to identify potential issues surrounding MSFW access to ES services. Specifically, Monitor Advocates will be able to compare the number of MSFW reportable individuals and the number of MSFW participants and use this data to identify potential areas where MSFWs are not being offered participant-level services. The collection of this data is consistent with the Monitor Advocate System's purpose to monitor whether MSFWs have meaningful access to services in a way that is appropriate to their particular needs. SWAs commonly report few or no MSFW ES participants, which creates the concern that MSFWs do not have access to ES services. This piece of information will enable Monitor Advocates to identify cases where there may be larger numbers of MSFW reportable individuals, but few or no MSFW participants. Without this information, Monitor Advocates and the Department lack data necessary to identify whether that problem exists, and cannot work to correct the problem, if it is present.

Second, the Department proposes to redesignate § 653.109(b)(10) as § 653.109(b)(11), as a technical edit to account for the insertion of proposed § 653.109(b)(10).

Third, the Department proposes several revisions to § 653.109(h), which sets forth the minimum levels of service that significant MSFW States must meet. First, the Department proposes to replace the requirement that a significant MSFW State measure the number of outreach contacts per "week" with the number of outreach contacts per "quarter" to align with the SWA's quarterly data submissions to the Department. SMAs have provided feedback to the Department that measuring contacts per week is difficult and not an effective measurement of outreach, and they believe it would be a better measure to report contacts per quarter. Second,



the Department proposes to clarify that it will not update minimum service level indicators on an annual basis, by removing “for each year” from the last sentence in § 653.109(h). The Department’s practice has been that minimum service level indicators have not been updated each year because the Department has not identified such a need. This revision would align the regulation with what is happening in practice.

**Section 653.110 Disclosure of data.**

The Department proposes to revise § 653.110(b) by removing the word “the” before “ETA,” as a technical edit.

**Section 653.111 State Workforce Agency staffing requirements for significant MSFW one-stop centers.**

The Department proposes several revisions to § 653.111, which outlines SWA staffing requirements for significant MSFW one-stop centers. First, the Department proposes to revise the heading of this section to clarify that the staffing requirements in this section apply only to significant MSFW one-stop centers.

Second, the Department proposes to revise paragraph (a)—which currently requires SWAs to implement and maintain a program for staffing significant MSFW one-stop centers by providing ES staff in a manner facilitating the delivery of employment services tailored to the special needs of MSFWs, including by seeking ES staff that meet the criteria in § 653.107(a)(3)—and divide it into two sentences. The first sentence would provide that a SWA *must* staff significant MSFW one-stop centers in a manner that facilitates the delivery of ES services tailored to the unique needs of MSFWs, and the second sentence would clarify that such staffing includes recruiting qualified candidates who meet the criteria for outreach worker positions in § 653.107(a)(3). The Department proposes this change to specify that SWAs must recruit qualified candidates who meet the criteria for outreach workers in § 653.107(a)(3). SWAs have some discretion to create a plan to meet the standard, but the ultimate requirement is for SWAs to recruit qualified candidates who meet these criteria.

Third, for purposes of consistency, the Department proposes a technical edit to replace “special needs of MSFWs” with “unique needs of MSFWs,” to conform to the terminology that the Department uses elsewhere in the ES regulations.

## **2. Subpart F – Agricultural Recruitment System for U.S. Workers (ARS)**

Subpart F sets forth the regulations governing the ARS.

### **Section 653.501 Requirements for processing clearance orders.**

Section 653.501 describes the requirements that ES staff must follow when processing clearance orders for the ARS. As explained subsequently, the Department proposes to make several substantive and technical revisions to this section.

The Department proposes to make a minor clarifying edit to § 653.501(a) by replacing the terms “ES office” or “SWA official” with “ES staff” to conform with the proposed revision to the definition of *ES staff* at § 651.10.

The Department proposes to add a fourth paragraph to § 653.501(b), at § 653.501(b)(4), which would require ES staff to consult the Department’s Office of Foreign Labor Certification (OFLC) and Wage and Hour Division (WHD) debarment lists before placing a job order into intrastate or interstate clearance and initiate discontinuation of ES services if the employer is debarred or disqualified from participating in one or all of the Department’s foreign labor certification programs. The Department’s mission is to promote the welfare of workers. This addition is intended to further that mission by ensuring that ES offices do not place U.S. workers with employers who are presently barred from employing immigrant and nonimmigrant workers via the employment-based visa programs. This requirement protects workers who may be using the ARS by ensuring that the ARS is not used to place a worker with an employer that has failed to comply with its obligation(s) as an employer of foreign workers. ETA’s regulations at 20 CFR 655.73, 655.182, 655.473, 656.31(f), and the Wage and Hour Division’s regulations at 29 CFR 503.24 describe the violations that may result in an employer’s debarment from receiving future labor certifications for a specified time period. The potential reasons for debarment include

serious violations that could affect worker safety, for example “[a] single heinous act showing such flagrant disregard for the law” that future compliance with program requirements cannot reasonably be expected (§ 655.182(d)(1)(x)). Such reasons also include an employer’s substantial failure to comply with regulatory requirements, including an employer’s failure to pay or provide the required wages or working conditions, an employer’s failure to comply with its obligations to recruit U.S. workers, or an employer’s failure to cooperate with required audits or investigations. Additionally, an employer’s failure to pay a necessary certification fee in a timely manner may result in debarment. In the Department’s view, whether the reason an employer is debarred from an OFLC program (or programs) is directly related to worker safety, failure to provide required wages or working conditions, failure to comply with recruitment requirements or participate in required investigations or audits, or failure to pay required fees, the employer subject to debarment should be excluded from participation in the ARS. The Department does not want to facilitate placement of workers with employers whose actions have risen to a level that warrants debarment.

The Department proposes minor edits to § 653.501(c)(3) to clarify that paragraph (c) sets forth a list of the assurances that an employer must make before the SWA may place a job order into intrastate or interstate clearance.

In addition, the Department proposes to make several technical and conforming edits in § 653.501(d). First, the Department proposes to revise § 653.501(d)(1) by clarifying that the provision refers to the “order-holding ES office,” instead of “order-holding office,” as it is currently written. This proposed change aligns with § 651.10 by using the defined term, *ES office*.

Second, the Department proposes to revise § 653.501(d)(3) by referring to “this paragraph” instead of “paragraph (d)(3) of this section” for clarity.

Third, the Department proposes to revise § 653.501(d)(6) to remove the explicit instruction for ES staff to assist all farmworkers “upon request in their native language.” This

revision is intended to align with the broader proposed revisions regarding language access in this NPRM. Because the Department proposes in this NPRM to clarify that SWAs must already comply with the language access and assistance requirements at 29 CFR 38.9, the language access requirement here is redundant, unnecessary, and potentially confusing, because it may appear to set a different standard.

Fourth, the Department proposes to revise § 653.501(d)(10) to remove the sentence requiring checklists under this paragraph to be in the workers' native language because, as previously mentioned, language access requirements are already provided at 29 CFR 38.9 and retaining this language would be redundant and unnecessary. The Department also proposes to remove the requirement that SWAs must use a standard format provided by the Department (such as Form WH516 or a successor form) to provide workers referred to clearance orders a checklist summarizing wages, working conditions, and other material specifications in the clearance order. Removing this requirement would provide SWAs with greater flexibility to develop and use their own forms that meet their needs. Under the proposed revision, SWAs may still use standard forms, including the WH516, but they would not be required to use a standard form. Regardless, the checklist that the SWA provides workers must include the material terms and conditions of employment that are required to be included in clearance orders pursuant to § 653.501(c)(1)(iv).

Finally, the Department proposes to revise § 653.501(d)(11) to replace the reference to the Department's "ARS Handbook" with a reference to "Departmental guidance." As proposed, § 653.501(d)(11) would require the applicant-holding office to give each referred worker a copy of the list of worker's rights described in Departmental guidance. This revision is intended to reflect the fact that this list of worker's rights may be available in different documents and formats in the future.

#### **Section 653.503 Field checks.**

The Department proposes to make two conforming and clarifying edits to the regulations governing field checks in § 653.503. First, the Department proposes to revise § 653.503(a) to add “transportation” to the list of conditions that SWAs must assess and document when performing a field check. This change would increase health and safety of MSFWs by adding an additional safeguard against dangerous transportation tied to their employment.

Second, the Department also proposes to remove that the field checks are “random.” The proposed revision would clarify that the selection of the clearance orders on which the SWA will conduct field checks does not need to be random, and may respond to known or suspected compliance issues, thereby improving MSFW worker protection. In addition, if a SWA makes placements on 9 or fewer clearance orders, the SWA must conduct field checks on 100 percent of those clearance orders. See § 653.503(b). Therefore, in those cases, field checks could not be conducted on a random basis.

**E. Part 658 – Administrative Provisions Governing the Wagner-Peyser Act  
Employment Service**

This part sets forth the regulations governing the Complaint System for the Wagner-Peyser Act Employment Service (ES) at the State and Federal levels. Specifically, the Complaint System processes complaints against an employer about the specific job to which the applicant was referred through the ES, and complaints involving the failure to comply with ES regulations under 20 CFR parts 651, 652, 653, and 654. The Complaint System also accepts, refers, and, under certain circumstances, tracks complaints involving employment-related laws as defined in § 651.10. While the Complaint system is available to MSFWs and non-MSFWs, the Complaint System includes additional shorter processing timelines and additional follow-up on MSFW-related complaints, which are designed to provide increased protection for MSFWs. The Department proposes to revise several regulations within this part to conform with proposed revisions to definitions listed at § 651.10, remove redundancies and make other non-substantive technical edits, clarify or modify certain requirements, and improve equity and inclusion for

MSFWs in the ES system. The Department also proposes to remove the requirement that the SMA serve as a Complaint System Representative and eliminate the requirement that SMAs must process MSFW complaints. The Department is proposing these revisions because § 653.108 requires the SMA to monitor the Complaint System, and the proposed revisions would remove the challenge that exists when the SMA is required to monitor their own actions in processing MSFW complaints. The Department anticipates that an SMA will be more objective in monitoring the Complaint System if they are not tasked with monitoring their own actions. The proposed revisions would maintain the integrity of the Monitor Advocate System as it provides safeguards to MSFWs who participate in the Complaint System, and they would allow SMAs to focus their attention on monitoring the ES services that are provided to MSFWs in their State.

The Department has observed through analysis of SWA quarterly Labor Exchange Agricultural Reporting System 5148 Reports, meetings with SMAs and RMAs, and other communications with SWAs, that SWAs misunderstand several of the requirements currently in part 658. These misunderstandings have caused inaccurate recordkeeping and reporting, which impede the ability of SMAs and the Department to monitor MSFW complaints to determine whether the Complaint System is processing MSFW complaints consistently with the governing regulations. The Department also has received information, through 5148 Reports and Monitor Advocate Annual Summaries, that Complaint System activity is low in many States. Through Wage and Hour Division (WHD) investigations, news reports, SMA Annual Summaries, conversations with farmworkers and farmworker advocacy organizations, and anecdotal information SMAs share with the Department, the Department concludes that violations of employment-related laws against MSFWs may be prevalent across the country—therefore, it is concerning that Complaint System activity is low. In Program Year 2019 (July 2019-June 2020), which is the most recent complete set of data available, at least eight States did not report any MSFW complaints. RMAs and the NMA have communicated concerns to the Department that

one of the reasons complaint numbers may be low is because MSFWs are unaware of the Complaint System, or SWAs are not processing or recording complaints correctly.

Through SWA 5148 Reports and RMA monitoring, the Department has identified several common requirements in the regulatory text that SWAs may misunderstand. These misunderstandings have a direct impact on the availability and correct processing of complaints. To address these issues, several of the proposed revisions are more prescriptive than the existing regulatory text and specifically clarify terms and other requirements.

## **1. Subpart E – Employment Service and Employment-Related Law Complaint System (Complaint System)**

### **Section 658.410 Establishment of local and State complaint systems**

The Department proposes to amend § 658.410(c) to replace the word “SWA” with “State” so that it clearly points to the defined term “State Administrator.” This change will clarify which specific individual is responsible to ensure a central complaint log is maintained.

The Department proposes to remove language in § 658.410(c)(6) that the complaint log must include actions taken on apparent violations and, instead, add several specific references in § 658.410(c)(1) through (6) that explain that each requirement also applies to apparent violations. These proposed changes are intended to clarify that the complaint log must document all the same components for apparent violations, except for the complainant’s name because there is no complainant for an apparent violation. The Department commonly identifies issues through RMA monitoring of SWAs where complaint logs do not document apparent violations. These proposed revisions would clarify the requirement to document apparent violations and specify the information that SWAs must include on the complaint log.

The Department also proposes to amend § 658.410(c)(6) to make all uses of the word “action” plural because there may be several actions taken to appropriately process a complaint or apparent violation. This change is necessary to clarify to SWAs that they must document all actions. The Department also proposes to describe the type of information SWAs must include in

their complaint logs by noting that it includes any documents the SWA sent or received and the date the SWA took such action(s). This change will mean the SWA must specifically record documents the SWA sent or received, and the dates of those actions, on the complaint log. Through monitoring SWAs, the Department has observed that SWAs often do not keep records of all actions taken. Instead, SWAs often have minimal information listed on their complaint logs. The proposed changes are purposefully prescriptive because it is critical that the Department has records of all documents sent and received related to complaints and apparent violations. This allows the Department to have sufficient information to monitor SWA complaint and apparent violation processing. These records are also critical when RAs receive appeals from SWA determinations and must review whether a SWA's actions are compliant.

The Department proposes to amend § 658.410(g) to remove the word “local,” which comes before “ES office” in the existing regulatory text. This proposed change is appropriate because *ES office* is a defined term at § 651.10 and, therefore, the word “local” is not necessary. Removal of the word “local” will also clarify that the regulatory text is not referring to a different type of office.

The Department proposes to remove the requirement in § 658.410(h) that the SMA must be the Complaint System Representative designated to handle MSFW complaints and replace it with a provision prohibiting the State Administrator from assigning the SMA responsibility for processing MSFW complaints. The Department is proposing this change because SMAs are also tasked with monitoring the Complaint System, and the Department anticipates that SMAs will be more objective in monitoring the Complaint System if they are not tasked with monitoring work that they themselves perform. Removing this responsibility would also allow SMAs to focus their attention on monitoring the ES services provided to MSFWs in their State.

For similar reasons, the Department proposes to revise § 658.410(m) to replace “SMA” with “Complaint System Representative.” This proposal is consistent with other changes



throughout part 658 that remove the SMA's direct involvement in the Complaint System, including the proposed removal of the SMA being designated to process MSFW complaints.

The Department proposes to remove § 658.410(n), which currently addresses correspondence to complainants who are English-language learners. The Department has determined that it is no longer necessary to include explicit requirements regarding language access in various sections of the ES regulations, because all one-stop centers and ES staff must comply with the language access and assistance requirements in 29 CFR 38.9 with regard to all LEP individuals, including those LEP individuals who file complaints under the Complaint System set forth in this subpart. This proposed revision is consistent with the Department's proposed addition in § 653.103(b), which would require SWAs to comply with the language access and assistance requirements at 29 CFR 38.9 with regard to all LEP individuals, including MSFWs who are LEP individuals, as defined at 29 CFR 38.4(hh). The proposed revision would specify that this requirement includes ensuring ES staff in one-stop centers comply with these language access requirements. The regulations at 29 CFR 38.9 establish that language access requirements apply to services provided to all LEP individuals at all one-stop centers and are broader than the existing requirement at § 658.410(n). For these reasons, the reference in § 658.410(n) is no longer necessary. Like the reasons laid out previously in the preamble concerning proposed changes to § 653.103(b), having a specific reference to LEP translations for complaint correspondence may inaccurately create the appearance that there are two sets of language access standards or that requirements for the Complaint System are narrower. Removing the reference clarifies that the full scope of 29 CFR 38.9 also applies to LEP individuals participating in the Complaint System.

Due to the proposed removal of current regulatory text in § 658.410(n), the Department proposes to redesignate the existing regulatory text at § 658.410(o) as § 658.410(n).

#### **Section 658.411 Action on complaints.**

The Department proposes to amend § 658.411(a)(2)(ii) to remove the word “and” before “telephone numbers” in the listed methods to contact a complainant, and to add “and any other helpful means by” to broaden the scope of contact methods requested from complainants. In addition, the Department proposes to indicate that there may be multiple physical addresses and email addresses through which a complainant could be contacted. The Department has received information from SWAs and other grantee organizations, including NFJP grantees, that MSFWs often do not have or respond to traditional methods of communication, including mail, email, and telephone. Specifically, migrant farmworkers move from one location to another for work, so it is not always reliable or efficient to send communications through mail to their last known or permanent addresses. Additionally, SWAs and NFJP grantees indicate that MSFW youth often are more responsive to communication sent through social media and other applications. In the process of advising SWAs regarding complaints, the Department has encountered several cases where SWAs closed complaints because the complainant failed to respond to the SWA. It is possible that a portion of these failures to respond are due to lack of current contact information, instead of the complainant’s desire to close the complaint. The Department’s proposed revision addresses this issue by directing SWAs to request from complainants any other helpful means by which they might be contacted, which would broaden the potential methods by which SWAs may contact complainants and account for the fact that complainants may receive information through various platforms other than physical mail, email, or telephone, including technological applications. This would also increase the likelihood that SWAs will be able to communicate with complainants to process complaints to resolution. This change should improve MSFW access to the Complaint System and increase the SWA’s ability to resolve complaints.

Paragraph (b) of § 658.411 covers complaints regarding an employment-related law. The Department proposes to amend § 658.411(b)(1) to replace “a” with “an” before “ES office” as a technical grammar edit. The Department also proposes to clarify the appropriate steps for processing employment-related law complaints involving alleged violations of nondiscrimination

laws or reprisal for protected activity by revising § 658.411(b)(1), to add a reference to § 658.411(c). This revision would clarify that the procedures in § 658.411(c) apply to any employment-related law complaint alleging unlawful discrimination or reprisal for protected activity in violation of nondiscrimination laws, such as those enforced by the EEOC or the DOL's CRC, or in violation of the Immigration and Nationality Act's anti-discrimination provision found at 8 U.S.C. 1324b.

The Department proposes three changes to § 658.411(b)(1)(ii)(B). First, the Department proposes to remove both references to the SMA making determinations and taking actions on employment-related law complaints and replace the first with a reference to the "Complaint System Representative." This proposal is consistent with other changes throughout part 658 that remove the SMA's direct involvement in the Complaint System, including the proposed removal of the SMA being designated to process MSFW complaints. As explained earlier, the Department is proposing to remove the SMA from Complaint System processing because the SMA duties outlined at § 653.108 include monitoring the Complaint System, and the Department anticipates that SMAs will be more objective in performing this monitoring if they are not tasked with monitoring their own actions for compliance. Second, the Department proposes to replace the word "employment" with "ES" before "services" in the last sentence to conform with the defined term *Wagner-Peyser Act Employment Service (ES) also known as Employment Service (ES)*. The Department also proposes to change "and except" to "or" to clarify that immediate action must be taken in cases where either the Complaint System Representative determines that it is necessary or where informal resolution would be detrimental to the complainant.

Consistent with the proposed removal of the SMA from § 658.411(b)(1)(ii)(B), the Department proposes to amend § 658.411(b)(1)(ii)(D) to remove the requirement for the ES office or SWA Complaint System Representative to refer the complaint to the SMA who must immediately refer the complaint. Instead, under the proposed regulatory text, the ES office or SWA Complaint System Representative would themselves refer the complaint immediately to

the appropriate enforcement agency for prompt action. This change would remove the SMA from Complaint System processing for the same reasons that the Department proposes to remove the SMA from other aspects of Complaint System processing. This proposed change is consistent with the SWA's requirements in processing non-MSFW complaints, where staff other than the SMA refer complaints to enforcement agencies. Additionally, this proposed change would decrease the amount of administrative time for complaints to be referred for prompt action by enforcement agencies. It is important to note that this regulation specifically deals with complaints that ES offices or SWA staff have determined need to be referred to a State or Federal agency. Requiring staff to refer the complaint first to the SMA, who then refers to the applicable agency, adds unnecessary time, which may cause avoidable harm to complainants in sensitive or otherwise serious, time-sensitive situations.

The Department proposes to remove all references to the "SMA" in 20 CFR 658.411(b)(1)(ii)(D) and (E) to conform with the Department's proposal to remove the SMA from playing a direct role in Complaint System processing. Under the proposed changes, the complaint will not be referred to the SMA. Instead, the Complaint System Representative must notify the complainant of the enforcement agency to which the complaint was referred, rather than for the SMA to notify the complainant.

The Department proposes to add § 658.411(b)(1)(ii)(F) to provide steps ES offices and SWAs must take when they receive complaints alleging an employer in a different State has violated an employment-related law, when such complaints are filed by or on behalf of MSFWs. The proposed changes would require SWAs and ES offices to use the same process for processing employment-related law complaints as § 658.411(d)(ii) currently requires for ES complaints involving an employer in another State. This situation comes up periodically, and the Department has advised SWAs to follow the same procedures for when an ES complaint is filed in a different State, which includes sending the complaint to the SWA in the other State. This addition is intended to make the employment-related law complaint regulations consistent with

current SWA practices. Because the regulations currently do not address this scenario, the regulations currently are unclear as to whether ES offices and SWAs must immediately refer employment-related law complaints against out-of-State employers to enforcement agencies or if they should attempt to resolve MSFW-related complaints involving employers in other States. The Department believes that the most beneficial option is for these complaints to be referred to the SWA in the other State, consistent with how SWAs process complaints involving employers in other States. Additionally, the entity best situated to process a complaint is the SWA for the State where the employer is located, because that SWA has greater knowledge of applicable employment-related laws and may have other records for the employer that impact appropriate decision making. The proposed changes also specifically require the ES office or SWA receiving the complaint to ensure the Complaint/Referral Form is adequately completed before sending the Complaint/Referral Form and copies of any relevant documents to the SWA in the other State. This language is designed to correct issues the Department has observed, where SWAs have informed SWAs in other States of complaint information but have not completed the Complaint/Referral Form or provided copies of any relevant documents. As a result, the other State SWAs were not able to contact the complainant or identify other critical information to act on the complaint, including material facts and allegations and the identity of the employer respondent. The proposed changes explicitly require the referring SWA to provide this necessary documentation so that the SWA receiving the complaint can address it appropriately.

The Department proposes to revise the heading and text of § 658.411(c) to clarify that all complaints under this subpart alleging unlawful discrimination or reprisal for protected activity should be handled in accordance with the procedures in this paragraph. In addition, the Department proposes to modify the procedures in this paragraph to require an ES office or SWA in receipt of such a complaint to log and immediately refer it to the State-level EO Officer. The process set forth in the existing regulations has proven to be confusing, because it identifies multiple officials to which nondiscrimination complaints should be referred and requires ES staff

to determine which nondiscrimination laws are at issue. The revisions that the Department proposes here would simplify the process by requiring ES offices and SWAs to treat all nondiscrimination complaints that they receive under this subpart in the same manner. Specifically, under the proposed revision, when an ES office or SWA receives such a complaint, they will log it and immediately refer it to the State-level EO Officer, regardless of the nondiscrimination law(s) at issue, and notify the complainant of the referral in writing. The State-level EO Officer will then either process the complaint if it is within their jurisdiction or immediately refer the complaint to the appropriate enforcement agency if it is not. This simplified referral process will reduce confusion for ES staff and ensure that someone with appropriate nondiscrimination expertise—the State-level EO Officer—will determine how the complaint should be handled and by whom.

The Department proposes to amend § 658.411(d) throughout to replace “a” with “an” as a technical edit when it comes before “ES office.” In addition, the Department proposes to revise § 658.411(d)(1) to clarify that the procedures in § 658.411(c) apply to all ES complaints alleging violations of nondiscrimination laws, including violations of EEOC regulations, the Immigration and Nationality Act’s anti-discrimination provision, or laws enforced by CRC.

The Department proposes to rephrase § 658.411(d)(2)(ii)(A), which addresses how an ES office should process an ES complaint filed against an employer that is not located within its service area, to clarify the order of steps such an office must take, without substantively changing the steps. Specifically, the proposed regulatory text changes the phrasing from “must send, after ensuring that the Complaint/Referral Form is adequately completed, a copy. . .” to “must ensure the Complaint/Referral Form is adequately completed, and then immediately send a copy. . . .” This proposed change is consistent with the proposed change at § 658.411(b)(3), so that processes for both ES complaints and employment-related law complaints (other than alleged violations of rights under the EEOC regulations or laws enforced by CRC, as described

at § 658.411(c)) are the same when the complaint involves an employer in a different State. The changes are, therefore, necessary for clarity and consistency.

At § 658.411(d)(1)(iv), the Department proposes a technical edit to add a comma after “alleged agency-wide violation.”

The Department proposes to amend § 658.411(d)(4)(i) and (5)(i) to replace references to the SMA investigating, attempting informal resolution, and making written determinations with references to the “Complaint System Representative” taking such actions. This proposed change is necessary to conform to the proposed change, discussed previously, to remove the SMA from playing a direct role in Complaint System processing. This will strengthen the SMA’s role to monitor the Complaint System.

The Department proposes to amend § 658.411(d)(5)(i) to change “ES or SWA officials” to “the SWA” because the proposed changes to § 651.10 remove the definition of SWA official.

The Department proposes to amend § 658.411(d)(5)(ii) in three ways. First, the Department proposes to change “SWA officials” to “the SWA” because the proposed changes to § 651.10 remove the definition of *SWA official*. Because of this proposed term change, it is also necessary to make the word “determine” plural for subject-verb agreement. Second, the Department proposes to insert “, in writing,” between “request” and “hearing” to clarify that the complainant must request a hearing in writing. This change will make the procedures consistent with § 658.411(d)(5)(i)(D). Lastly, the Department proposes to change “working days” to “business days.” Under § 651.10, *working days* and *business days* have the same meaning and can be used interchangeably. However, because this reference is located immediately after a use of “business days” in § 658.411(d)(5)(i)(D), it may give the appearance that there are different meanings between the terms. To correct this issue, the Department proposes to use the same term — “business days” — in both places.

The Department proposes to amend § 658.411(d)(5)(iii)(G) to change “SWA official” to “SWA” because the proposed changes to § 651.10 remove the definition of *SWA official*. This change would make the provision agree with the proposed definitions.

#### **Section 658.419 Apparent violations.**

The Department proposes several clarifying revisions to § 658.419(a). First, the Department proposes to update § 658.419(a) to replace the words “a SWA, an ES office employee, or outreach staff” with “an ES staff member” to conform with proposed revisions to ES staff at § 651.10. It is not necessary to specifically refer to “outreach staff” in this section, because the definition of *outreach staff* means ES staff with the responsibilities described in § 653.107(b). This change will make § 658.419 more clear because the proposed regulatory text will use the term *ES staff* uniformly.

The Department also proposes to change the second reference to a “suspected violation” in § 658.419(a) to “apparent violation” for clarity. In addition, the Department proposes to add a sentence to § 658.419(a) to clarify that the apparent violation must be documented in the Complaint System log as described at § 658.410.

Finally, the Department proposes to add a sentence at the end of § 658.419(a) to clarify that when an apparent violation involves alleged violations of nondiscrimination laws, it must be processed according to the procedures described in § 658.411(c)—that is, it must be logged and immediately referred to the State-level EO Officer.

#### **Section 658.420 Responsibilities of the Employment and Training Administration regional office.**

The Department proposes several revisions to § 658.420. First, the Department proposes to revise § 658.420(b) to conform with the simplified process for referring nondiscrimination complaints in proposed § 658.411(c). In particular, the Department proposes to revise § 658.420(b)(1) to provide that if an ETA regional office receives a complaint alleging violations of nondiscrimination laws, then the complaint must be logged and immediately referred to the



appropriate State-level EO Officer(s). As explained previously under the section addressing revisions to § 658.411(c), this simplified referral process would provide clear instruction to ETA regional staff and task State-level EO Officers, who have appropriate nondiscrimination expertise, with determining how nondiscrimination complaints should be handled and by whom.

Second, the Department proposes to remove existing § 658.420(b)(2), which addresses complaints alleging discrimination on the basis of genetic information, because such complaints would fall under the simplified procedures set forth in proposed § 658.420(b)(1). Third, the Department proposes to make several revisions to conform with this deletion—namely, to move the text in existing § 658.420(c) to § 658.420(b) and remove all references to paragraph (b)(2) in this section.

Finally, the Department proposes to revise § 658.420(c) to clarify that when an ETA regional office receives an employment-related law complaint under this subsection, it should process the complaint in accordance with § 658.422. The existing regulation incorrectly references § 658.411, which provides complaint processing procedures for ES offices and SWAs (and not ETA regional offices).

#### **Section 658.422 Processing of employment-related law complaints by the Regional Administrator.**

The Department proposes several revisions to § 658.422. First, the Department proposes to revise paragraph (a) to clarify that this section applies to all “employment-related law” complaints submitted directly to the ETA Regional Administrator or their representative. Second, the Department proposes to add a sentence to the end of paragraphs (b) and (c) to conform with the proposed revisions to § 658.420(b)(1). In particular, proposed paragraphs (b) and (c) each include an additional sentence to specify that when a complaint described in the paragraph alleges a violation of nondiscrimination laws or reprisal for protected activity, then it must be referred to the appropriate State-level EO Officer in accordance with § 658.420(b)(1).

## **2. Subpart F – Discontinuation of Services to Employers by the Wagner-Peyser Act**

### **Employment Service**

#### **Section 658.501 Basis for discontinuation of services.**

The Department proposes to amend § 658.501(a)(4) to add that SWA officials must initiate procedures for discontinuation of services to employers who are currently debarred or disqualified from participating in one of the Department's foreign labor certification programs. This revision corresponds to the proposed addition in § 653.501(a)(4), which would require ES staff to consult the Department's OFLC and Wage and Hour Division debarment lists prior to placing a job order into intrastate or interstate clearance, and to initiate discontinuation of services pursuant to this subpart if the employer requesting access to the clearance system is currently debarred or disqualified from participating in one of the Department's foreign labor certification programs. As explained in the section of this preamble addressing the proposed addition in § 653.501(a)(4), the Department is proposing this requirement to protect workers that are referred to employers through the ARS by ensuring that the ARS is not used to place a worker with an employer that has failed to comply with its obligation(s) as an employer of foreign workers.

The Department proposes to amend § 658.501(b) to correct an error in the existing regulatory text, which improperly references § 658.501, instead of § 658.502. Specifically, the regulatory text currently provides that SWA officials may discontinue services immediately if, in the judgment of the State Administrator, exhaustion of the administrative procedures set forth in § 658.501(a)(1) through (7) would cause substantial harm to a significant number of workers. The reference to paragraphs (a)(1) through (7) of § 685.501 appears to have been made in error, because § 658.501 does not set forth administrative procedures but rather the bases for discontinuation of services. Section 658.502, by contrast, sets forth the process by which SWAs must generally follow when discontinuing the provision of ES services. Accordingly, the Department proposes to replace the cross reference in 658.501(b) to 658.501(a)(1) through (7)

with a cross reference to § 658.502, which will clarify that the administrative procedures that must otherwise be exhausted are set forth in § 658.502. This revision is necessary to clarify when a SWA official may discontinue services immediately.

The Department proposes to amend § 658.501(c) to correct an error in the regulatory text like the cross-referencing error in § 658.501(b). This section incorrectly references the bases on which a SWA may discontinue services to an employer in § 658.501(a)(1) through (8), instead of the procedures to discontinue such services set forth in § 658.502. Accordingly, the Department proposes to replace the reference to § 658.501(a)(1) through (8) with a cross reference to § 658.502.

The Department proposes to amend § 658.502(a)(4) to add that where a SWA's decision to discontinue services is based on the fact that the employer is currently debarred or disqualified from participating in one of the Department's foreign labor certification programs, the SWA must specify the time period for which the employer is debarred or disqualified. The proposed revision would further specify that the employer must be notified that all ES services will be terminated in 20 working days unless, within that time, the employer provides adequate evidence that the Department's disbarment or disqualification is no longer in effect or will terminate before the employer's anticipated date of need. Similar to the proposed revision to § 658.501(a)(4) discussed previously, the revisions proposed here correspond to the proposed addition in § 653.501(a)(4), which would require ES staff to consult the Department's OFLC and Wage and Hour Division debarment lists prior to placing a job order into intrastate or interstate clearance, and to initiate discontinuation of services pursuant to this subpart if the employer requesting access to the clearance system is currently debarred or disqualified from participating in one of the Department's foreign labor certification programs.

### **3. Subpart G – Review and Assessment of State Workforce Agency Compliance With Employment Service Regulations**

**Section 658.602 Employment and Training Administration National Office responsibility.**

The Department proposes to amend § 658.602(g) to refer to § 653.108(a) instead of § 653.108(b). This is necessary to correct the inaccurate citation to § 653.108(b), which does not contain self-monitoring requirements. This proposed revision will clarify the location of self-monitoring requirements for readers.

The Department proposes to amend the introductory text of § 658.602(n) to replace the phrase “in the course of” with the word “during” for purposes of clarity.

The Department proposes to amend § 658.602(n)(1) to replace the phrase “outreach workers” with “outreach staff” because *outreach staff* is a defined term in § 651.10. Using the defined term will make the regulatory text more clear regarding which staff it references.

The Department proposes to amend § 658.602(n)(2) to remove the word “random” from the requirement for the NMA to participate in field check(s) of migrant camps or work site(s) where MSFWs have been placed. The proposed revision would clarify that the selection of migrant camps or work sites for which the NMA will participate in field checks does not need to be random, and may be targeted, where necessary, to respond to known or suspected compliance issues, thereby improving MSFW worker protection.

The Department proposes to amend § 658.602(o) to remove “(8)” from the reference to paragraph (f)(8) as a technical edit. Paragraph (f) of § 658.602 does not have a subordinate paragraph (8).

#### **Section 658.603 Employment and Training Administration regional office responsibility.**

The Department proposes to amend § 658.603(d)(7) to replace uses of “job order” with “clearance order.” This change will make the provision conform with the proposed changes to the definition of *clearance order* in § 651.10. The change will also clarify that field checks should only be conducted on orders that have been cleared for intrastate and/or interstate recruitment, not including local job orders. The Department also proposes to remove the word “random” from the requirement for the RA to conduct field checks. Under the proposed revision, the selection of agricultural work sites does not need to be random, and may be targeted, where

necessary, to respond to known or suspected compliance issues, thereby improving MSFW worker protection. Finally, the Department proposes to add the word “and” before “working and housing conditions” to make clear that this is a single term that follows wages and hours in the list of items that must be specified on a clearance order.

Paragraph (i) of § 658.603 addresses RMA training. The Department proposes to amend § 658.603(i) to remove the requirement that the RMA participate in training sessions approved by the National Office within the first 3 months of their tenure and replace it with a requirement that would require the RMA to participate in training sessions offered by the National Office and additional training sessions necessary to maintain competency and enhance their understanding of issues farmworkers face (including trainings offered by OSHA, WHD, EEOC, CRC, and other organizations offering farmworker-related information). The proposed regulatory text removes the requirement for training within the first 3 months of an RMA’s tenure because RMAs must participate in all trainings necessary to learn and maintain competencies for the role. The proposed regulatory text clarifies that training attendance is required beyond the first 3 months of an RMA’s tenure. The proposed regulatory text regarding maintaining competencies specifically aligns with the Department’s training requirements for SMAs as well as EO staff training requirements, which provide a positive example for RMA training.

The Department proposes to amend § 658.603(p)(1) to replace “workers” with “staff.” This change would implement the defined term of *outreach staff* to clarify the type of staff to which the provision refers.

The Department proposes to amend § 658.603(p)(2) to remove the word “random” so that the RMA understands that clearance orders selected for a field check do not need to be selected at random. This change will clarify that RMAs may conduct targeted field checks where necessary, allowing the Department to respond to known or suspected compliance issues, in addition to random field checks.

#### **4. Subpart H – Federal Application of Remedial Action to State Workforce Agencies**

**Section 658.702 Assessment and evaluation of program performance data.**

The Department proposes to amend § 658.702(f)(2) to add references to the “RMA” in two places to clarify that the RA must notify both the RMA and the NMA when findings and noncompliance involve services to MSFWs or the Complaint System. Additionally, this proposed change would require the Final Notification to be sent to the RMA, as well as the NMA. These changes are necessary for the RMA to be aware of all ES issues involving MSFWs and the Complaint System, which the RMA is responsible to monitor. The notification required by these revisions would improve the RMA’s ability to effectively perform all required duties.

**Section 658.704 Remedial actions.**

The Department proposes to amend § 658.704(f)(2) to require that copies of the RA’s notification to the SWA of decertification proceedings must be sent to the RMA and the NMA. The existing regulatory text only requires that one copy be sent to the NMA. This revision is necessary because the RMA needs to be aware of all issues that relate to MSFWs in the regional office.

The Department proposes to amend § 658.707(a), which addresses the circumstances in which a SWA may request a hearing, to specify that any SWA that has received a Notice of Remedial Action under § 658.707(a) of this subpart may also request a hearing, and that the SWA may do so by filing a written request with the RA within 20 business days of the SWA’s receipt of the notice. This is a clarifying edit, as § 658.704(c) already provides a SWA the opportunity to request a hearing under these circumstances. The Department additionally proposes to add a reference to the RA in § 658.707(b), because § 658.704(c) directs the SWA to send its written request to the RA.

#### **IV. Rulemaking Analyses and Notices**

##### **A. Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review)**

Under Executive Order (E.O.) 12866, OMB's Office of Information and Regulatory Affairs (OIRA) determines whether a regulatory action is significant and, therefore, subject to the requirements of the E.O. and review by OMB. *See* 58 FR 51735 (Oct. 4, 1993). Section 3(f) of E.O. 12866 defines a "significant regulatory action" as an action that is likely to result in a rule that: (1) has an annual effect on the economy of \$100 million or more, or adversely affects in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities (also referred to as economically significant); (2) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the E.O. *Id.* This proposed rule is a significant regulatory action, although not an economically significant regulatory action, under sec. 3(f) of E.O. 12866. Accordingly, OMB has reviewed this proposed rule.

E.O. 13563 directs agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; the regulation is tailored to impose the least burden on society, consistent with achieving the regulatory objectives; and, in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits. E.O. 13563 recognizes that some benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

The Department anticipates that the proposed rule would result in costs, transfer payments, and benefits for State governments and agricultural employers. The costs of the proposed rule would include rule familiarization and additional information collection for State governments, as well as transition costs such as recruitment, training, and technology expenses for the four States (i.e., Colorado, Delaware, Massachusetts, and Michigan) that currently have non-State-merit staff providing some labor exchange services and would need to transition to State merit staff for the provision of all labor exchange services.<sup>13</sup>

The transfer payments would include the changes in wages and fringe benefits for staff providing Wagner-Peyser Act ES labor exchange services in the four States that currently have non-State-merit staff providing ES labor exchange services: Colorado, Delaware, Massachusetts, and Michigan.

The benefits of the merit-staffing provisions in the proposed rule would include the ability for States to shift staff resources during future surges in UI claims when time-limited legislative flexibilities in the delivery of UI services are not available. The Department also is proposing amendments to the regulations that govern labor exchange services provided to MSFWs, the Monitor Advocate System, and the Complaint System. These amendments would remove redundancies, clarify requirements, and improve equity and inclusion for MSFWs in the ES system.

## **1. Costs**

The Department anticipates that the proposed rule would result in costs related to rule familiarization, staff transition, and information collection.

### **a. Rule Familiarization Costs**

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<sup>13</sup> Since the 2020 Final Rule, some States expressed an interest in using non-merit staff. Delaware began using this flexibility and currently uses two contract staff for ES services. Missouri has an approved WIOA State Plan modification to utilize non-State-merit staff.



Regulatory familiarization costs represent direct costs to States associated with reviewing the new regulation. The Department's analysis<sup>14</sup> assumes that the changes introduced by the rule would be reviewed by Human Resources Managers (SOC code 11-3121) employed by SWAs. The Department anticipates that it would take a Human Resources Manager an average of 1 hour to review the rule.

The U.S. Bureau of Labor Statistics (BLS) Occupational Employment and Wage Statistics (OEWS) data show that the median hourly wage of State government Human Resources Managers is \$43.75.<sup>15</sup> The Department used a 61 percent benefits rate<sup>16</sup> and a 17 percent overhead rate,<sup>17</sup> so the fully loaded hourly wage is \$77.88 [= \$43.75 + (\$43.75 × 61%) + (\$43.75 × 17%)]. Therefore, the one-time rule familiarization cost for all 57 jurisdictions (the 50 States, the District of Columbia, Puerto Rico, American Samoa, the Commonwealth of the Northern Mariana Islands, Guam, the Republic of Palau, and the U.S. Virgin Islands) is estimated to be \$4,439 (= \$77.88 × 1 hour × 57 jurisdictions).

### **b. Transition Costs**

Four States would potentially incur one-time costs associated with the proposal to require all ES labor exchanges services to be provided by State merit staff. Colorado, Delaware, Massachusetts, and Michigan currently have some non-State-merit staff who provide labor exchange services, and these States may incur transition expenses, such as recruitment, training, or technology costs, as well as costs related to the State budgeting process. Moreover, job seekers and employers may experience nonquantifiable transition costs associated with service

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<sup>14</sup> This analysis uses codes from the Standard Occupational Classification (SOC) system and the North American Industry Classification System (NAICS).

<sup>15</sup> BLS, "Occupational Employment and Wage Statistics, National Industry-Specific Occupational Employment and Wage Estimates, NAICS 999200," SOC Code 11-3121, May 2020, [https://www.bls.gov/oes/current/naics4\\_999200.htm](https://www.bls.gov/oes/current/naics4_999200.htm) (last visited Aug. 2, 2021).

<sup>16</sup> BLS, "National Compensation Survey, Employer Costs for Employee Compensation," <https://www.bls.gov/ncs/data.htm> (last visited Aug. 2, 2021). For State and local government workers, wages and salaries averaged \$32.72 per hour worked in 2020, while benefit costs averaged \$20.09, which is a benefits rate of 61 percent.

<sup>17</sup> Cody Rice, U.S. Environmental Protection Agency, "Wage Rates for Economic Analyses of the Toxics Release Inventory Program," June 10, 2002, <https://www.regulations.gov/document/EPA-HQ-OPPT-2014-0650-0005> (last visited Aug. 2, 2021).

interruptions during the time period in which the State is making staff changes to comply with the provisions of this proposed rule.

The Department used a survey to ask the four States to estimate these potential expenses. One State anticipates that transition expenses would be minimal unless one of the local one-stop centers goes through an “upheaval” due to the proposed change. The State explained that the SWA provides employee training, and this would not change under the provisions in the proposed rule. Moreover, technology costs have always been shared costs, and recruitment is conducted by local management teams on an on-going basis. The State noted, however, that there would be significant disruptions in the workforce areas that use non-State merit-staffed employees to provide ES labor exchange services; those areas constitute 25 percent of the State’s workforce areas. Hiring State merit-staffed employees in those areas would take months; moreover, the State would need to add State supervision and engage in union negotiations.

A second State estimated that the transition costs related to training and technology would be minimal. However, obtaining additional FTE State merit-staffed employees would generate nonquantifiable costs. The State explained that the process would entail requesting and justifying new positions, preparing and submitting a budget request, posting the positions, interviewing candidates, checking references, and onboarding new hires. The State estimated that the process would take at least 12 to 18 months.

The Department is not able to quantify the transition costs to the four States due to the lack of data. The Department is seeking additional input from the four States on their potential transition expenses such as recruitment, training, or technology costs, as well as costs related to the State budgeting process. The Department is also seeking input on the potential costs associated with service interruptions during the time period in which the State is making staff changes to comply with the provisions of this proposed rule.

### **c. Information Collection Costs**

IC costs represent direct costs to States associated with the proposed information collection requests (ICRs) under this proposed rule.

The first ICR pertains to the proposed requirement that SWA Wagner-Peyser programs document Participant Individual Record Layout (PIRL) data element 413 for all reportable individuals. The Department assumes that this provision would entail three costs: (1) computer programming; (2) additional time for ES staff to help individuals register for services, and (3) additional time for SMAs to check the accuracy of the MSFW coding. SWAs would need to reprogram their ES registration systems to ask MSFW status (PIRL 413) questions earlier in the registration process. The Department assumes reprogramming would cost an average of \$4,000 per jurisdiction,<sup>18</sup> so the total one-time cost for reprogramming is estimated at \$228,000 ( $= \$4,000 \times 57$  jurisdictions). For the additional annual burden on ES staff, the Department anticipates that it would take an ES staff member an average of 2 minutes per reportable individual to ask the additional MSFW questions and record the answers. To estimate this cost, the Department used the median hourly wage of \$26.85 for educational, guidance, and career counselors and advisors (SOC code 21-1012) employed by State governments (NAICS 999200).<sup>19</sup> The Department used a 61-percent benefits rate and a 17-percent overhead rate, so the fully loaded hourly wage is \$47.79 [ $= \$26.85 + (\$26.85 \times 61\%) + (\$26.85 \times 17\%)$ ]. Assuming ES staff assist in registering half of the 10.2 million reportable individuals (based on the average for Program Years 2018, 2019, and 2020), the annual cost is estimated at \$8,129,913 ( $= 10,207,047$  reportable individuals  $\times 50\% \times 2$  minutes  $\times \$47.79$  per hour). For the annual burden on SMAs, the Department anticipates that it would take an SMA 1 hour per quarter to check the accuracy of the MSFW coding. To estimate this cost, the Department used the median hourly wage of \$36.25 for social and community service managers (SOC code 11-9151) employed by

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<sup>18</sup> Anecdotal evidence from States indicates a range of \$2,000 to \$6,000 to add one yes/no question to an existing data collection.

<sup>19</sup> BLS, "Occupational Employment and Wage Statistics, National Industry-Specific Occupational Employment and Wage Estimates, NAICS 999200, SOC 21-1012." [https://www.bls.gov/oes/current/naics4\\_999200.htm](https://www.bls.gov/oes/current/naics4_999200.htm).

State governments (NAICS 999200).<sup>20</sup> The Department used a 61-percent benefits rate and a 17-percent overhead rate, so the fully loaded hourly wage is \$64.53 [= \$36.25 + (\$36.25 × 61%) + (\$36.25 × 17%)]. Therefore, the annual cost is estimated at \$14,713 (= 57 SMAs × 4 hours per year × \$64.53 per hour).

The second ICR pertains to the proposed requirement that SWA applicant-holding offices provide workers referred on clearance orders with a checklist summarizing wages, working conditions, and other material specifications in the clearance order. The Department anticipates that it would take an ES staff member an average of 35 minutes to read the clearance order, create a checklist, and provide the checklist to applicants. To estimate this cost, the Department used a fully loaded hourly wage of \$47.79 for educational, guidance, and career counselors and advisors (SOC code 21-1012) employed by State governments (NAICS 999200). Assuming 14,580 clearance orders per year (based on the number of clearance orders reported by SWAs in Program Year 2019), the annual cost is estimated at \$406,454 (= 14,580 clearance orders × 35 minutes × \$47.79 per hour).

The third ICR pertains to the proposed changes associated with the Migrant and Seasonal Farmworker Monitoring Report and Complaint/Apparent Violation Form. The Department assumes that this provision would entail two costs: (1) time for ES Managers to update a central complaint log, and (2) additional time for SMAs to complete the Annual Summary due to content changes. For the annual burden on ES Managers, the Department anticipates that it would take an ES Manager 8 hours per year to update the central complaint log. To estimate this cost, the Department used a fully loaded median hourly wage of \$64.53 for social and community service managers (SOC code 11-9151) employed by State governments (NAICS 999200). Assuming that there are approximately 2,400 ES Managers (based on the approximate number of one-stop centers), the annual cost is estimated at \$1,238,976 (= 2,400 ES Managers ×

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<sup>20</sup> BLS, “Occupational Employment and Wage Statistics, National Industry-Specific Occupational Employment and Wage Estimates, NAICS 999200, SOC 11-9151.” [https://www.bls.gov/oes/current/naics4\\_999200.htm](https://www.bls.gov/oes/current/naics4_999200.htm).

8 hours per year  $\times$  \$64.53 per hour). For the annual burden on SMAs, the Department anticipates that it would take an SMA an additional 3 hours per year to complete the Annual Summary due to content changes. To estimate this cost, the Department used a fully loaded median hourly wage of \$64.53 for social and community service managers (SOC code 11-9151) employed by State governments (NAICS 999200). Therefore, the annual cost is estimated at \$11,035 ( $= 57 \text{ SMAs} \times 3 \text{ hours per year} \times \$64.53 \text{ per hour}$ ).

The fourth ICR pertains to the proposal to require the delivery of all ES labor exchanges services by State merit staff. The Department proposes to create a new ICR that would require Unified or Combined State Plans to describe how the State will staff labor exchange services under the Wagner-Peyser Act using State merit staff. The Department does not anticipate additional costs related to this requirement given that States must already describe in their Unified or Combined State Plans how ES labor exchange services will be delivered.

In total, the proposed rule is expected to have first-year IC costs of \$10.0 million in 2020 dollars. Over the 10-year analysis period, the annualized costs are estimated at \$9.8 million at a discount rate of 7 percent in 2020 dollars.

## **2. Transfer Payments**

According to OMB Circular A-4, transfer payments are monetary payments from one group to another that do not affect total resources available to society. The transfer payments for this proposed rule are the transfer payments associated with employee wages and fringe benefits.

The 2020 Final Rule gave all States and territories more staffing options for delivering labor exchange services. Four States (Colorado, Delaware, Massachusetts, and Michigan) currently have non-State-merit staff providing labor exchange services, and others have expressed interest in such an arrangement. This proposed rule would require all ES labor exchange services to be provided by State merit-staffed employees; therefore, these four States would need to restaff (along with other States that could implement non-State-merit staffing before this NPRM is finalized) and may incur additional wage costs. For purposes of E.O.

12866, these additional wage costs are categorized as transfer payments from States to employees.

To estimate the transfer payments, the Department surveyed the four States and asked them to provide the total number of full-time equivalent (FTE) hours provided by State merit staff and non-State-merit staff dedicated to delivering ES services, as well as the occupation (or position title) and annual salary for all employees included in the FTE calculations. Delaware, Massachusetts, and Michigan provided data via email, while Colorado responded via telephone.

Delaware reported that it currently has two FTE non-State, merit-staffed employees delivering ES services: one FTE management analyst with an annual salary of \$59,000 and one FTE migrant farm outreach worker with an annual salary of \$48,000. The Department assumes that Delaware would replace the two FTE non-State, merit-staffed employees with one State merit-staffed management analyst (SOC code 13-1111) and one State merit-staffed community and social service specialist (SOC code 21-1099). To calculate the change in wage costs for Delaware, the Department used OEWS data to estimate the median annual wages for management analysts and community and social service specialists employed by the State of Delaware. The median annual wage for management analysts is \$61,840, while the median annual wage for community and social service specialists is \$43,910.<sup>21</sup>

The Department adjusted the annual wages to account for fringe benefits (61 percent) and overhead costs (17 percent). Then, the Department calculated the difference between the fully loaded wage rates of the two current non-State-merit staff and two potential State merit staff. The decrease in wage costs for Delaware is estimated at \$2,225 per year.<sup>22</sup>

Massachusetts reported that currently it has approximately 30 FTE non-State, merit-staffed employees providing ES services, but did not provide their job titles or annual salaries. Based on the occupational distribution of the State merit staff reported by Massachusetts, the

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<sup>21</sup> BLS, OEWS data for government workers by State, May 2020, [https://www.bls.gov/oes/special.requests/oes\\_research\\_2020\\_sec\\_99.xlsx](https://www.bls.gov/oes/special.requests/oes_research_2020_sec_99.xlsx) (last visited Aug. 2, 2021).

<sup>22</sup>  $(\$61,840 - \$59,000) \times 1.78 + (\$43,910 - \$48,000) \times 1.78 = -\$2,225$ .

Department assumes that 80 percent (or 24 FTEs) of the 30 FTE non-State-merit staff are educational, guidance, and career counselors and advisors (SOC code 21-1012), 10 percent (or 3 FTEs) are social and community service managers (SOC code 11-9151), and 10 percent (or 3 FTEs) are office and administrative support workers (SOC code 43-0000). To calculate the change in wage costs for Massachusetts, the Department used OEWS data on median annual wages in Massachusetts for the three occupations identified previously. The median wage rates for private sector workers are not available by State and occupation; therefore, the Department used the median wage rates for all sectors in Massachusetts as a proxy because private sector jobs constitute 85 percent of total employment.<sup>23</sup> The median annual wage for educational, guidance, and career counselors and advisors in Massachusetts is \$69,722, the median for social and community service managers is \$67,309, and the median for office and administrative support workers is \$46,342.<sup>24</sup>

Massachusetts reported that the median annual salary for State merit-staffed ES services representatives and State merit-staffed job specialists is \$59,689, the median for State merit-staffed program managers is \$75,880, and the median for State merit-staffed office support specialists is \$47,176.<sup>25</sup> The Department adjusted the annual wages to account for fringe benefits (61 percent) and overhead costs (17 percent). Then, the Department calculated the difference between the fully loaded wage rates of the 30 current non-State-merit staff and 30 potential State merit staff. The decrease in wage costs for Massachusetts is estimated at \$378,387 per year.<sup>26</sup>

Michigan reported that it currently has approximately 192 FTE non-State-merit staff. A wide range of occupational titles for non-State-merit staff providing ES services was reported;

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<sup>23</sup> In May 2020, total employment was 139,099,570 ([https://www.bls.gov/oes/current/oes\\_nat.htm](https://www.bls.gov/oes/current/oes_nat.htm)), with 117,718,070 jobs (85 percent) in the private sector (<https://www.bls.gov/oes/current/000001.htm>) and 21,381,500 jobs (15 percent) in the government sector (<https://www.bls.gov/oes/current/999001.htm>).

<sup>24</sup> BLS, “OEWS, May 2020 State Occupational Employment and Wage Estimates: Massachusetts,” [https://www.bls.gov/oes/current/oes\\_ma.htm](https://www.bls.gov/oes/current/oes_ma.htm) (last visited Aug. 2, 2021).

<sup>25</sup> The Department assumes that Massachusetts would replace non-State, merit-staffed educational, guidance, and career counselors and advisors with State merit-staffed ES services representatives or job specialists; non-State, merit-staffed social and community service managers with State merit-staffed program managers; and non-State, merit-staffed office and administrative support workers with State merit-staffed office support specialists.

<sup>26</sup>  $(\$59,689 - \$69,722) \times 24 \times 1.78 + (\$75,880 - \$67,309) \times 3 \times 1.78 + (\$47,176 - \$46,342) \times 3 \times 1.78 = -\$378,387$ .

however, most of the staff members are program managers, employment and job specialists (or other professional occupations), or office and administrative support workers. Based on the occupational distribution of the State merit staff reported by Michigan, the Department assumes that 7 percent (or 14.3 FTEs) of the 192 FTE non-State-merit staff are program managers, 83 percent (or 159.3 FTEs) are employment and job specialists, and 9 percent (or 18.1 FTEs) are office and administrative support workers. Michigan reported that the median annual salary plus benefits and other associated employment costs for non-State, merit-staffed program managers is \$86,494, the median for employment and job specialists (or other professional occupations) is \$50,955, and the median for non-State, merit-staffed office support specialists is \$43,602.

Michigan also reported that the median annual salary plus benefits and other associated employment costs for State merit-staffed State administrative managers is \$189,639, the median for State merit-staffed migrant service workers is \$100,894, and the median for State merit-staffed office secretaries is \$102,135.<sup>27</sup>

The Department did not adjust the annual wages to account for fringe benefits or overhead costs because the wages reported by Michigan already included benefits and other employment costs. The Department calculated the difference between the fully loaded wage rates of the 192 current non-State-merit staff and 192 potential State merit staff. The wage cost increase for Michigan is estimated at \$10,489,704 per year.<sup>28</sup>

In total, the proposed rule is expected to have annual transfer payments of \$10,109,091 for Delaware, Massachusetts, and Michigan ( $= -\$2,225 - \$378,387 + \$10,489,704$ ). The Department continues to seek data from Colorado and intends to include in the final rule an analysis of any pertinent data received.

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<sup>27</sup> The Department assumes that Michigan will replace non-State merit-staffed program managers with State merit-staffed employees paid at a rate similar to State administrative managers; non-State merit-staffed employment and job specialists (and other professional occupations) with State merit-staffed employees paid at a rate similar to migrant service workers; and non-State merit-staffed office and office support specialists with State merit-staffed employees paid at a rate similar to office secretaries. In categorizing each non-State employee, the Department used the job title and compensation rate provided by the State.

<sup>28</sup>  $(\$189,639 - \$86,494) \times 14.3 + (\$100,894 - \$50,955) \times 159.3 + (\$102,135 - \$43,602) \times 18.1 = \$10,489,704$ .



This proposed rule may impact the demographic composition of the staff delivering ES labor exchange services. State government employees are more likely than private sector employees to be women or black. Current Population Survey data show that 60 percent of State government employees in 2020 were women compared to 46 percent of private sector employees. With respect to race, 75 percent of State government employees in 2020 were white compared to 78 percent of employees in the private sector, 15 percent of State government employees were black compared to 12 percent of employees in the private sector, and 6 percent of State government employees were Asian compared to 7 percent of employees in the private sector. As far as the ethnic composition of these two labor forces, 12 percent of State government employees in 2020 were Hispanic compared to 18 percent of employees in the private sector.<sup>29</sup>

### **3. Nonquantifiable Benefits**

The Department is proposing to reinstate the longstanding requirement that States use only State merit staff to deliver ES labor exchange services, with no exceptions. The COVID-19 pandemic placed an enormous burden on State UI programs due to the significant increase in UI claims from the massive number of unemployed workers. The number of continued claims rose from fewer than 2 million before the pandemic to more than 20 million in the week ended May 9, 2020. It became evident to the Department that, during a crisis that displaces a large number of workers in a short time, it could become imperative for States to shift staff resources from ES services to support urgent UI services. Being able to do so, however, would require that ES labor exchange services be provided only by State merit staff because UI services are required to be delivered solely by State merit staff pursuant to sec. 303(a)(1) of the Social Security Act. Requiring labor exchange services to be provided by State merit staff will help ensure that States have the flexibility to shift staff resources during future surges in UI claims where time-limited legislative flexibilities to UI services are not available.

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<sup>29</sup> BLS, Current Population Survey, unpublished tables.

The benefits of requiring States to use only State merit staff to deliver ES labor exchange services are not entirely quantifiable. Yet, in addition to States benefiting from the availability of State merit staff to assist with a surge in UI services, benefits also accrue to individuals accessing labor exchange services delivered by State merit personnel. State merit-staffed employees are accountable only to their State government, are hired through objective, transparent standards, and must deliver services to all customers of the ES system according to established standards. In exercising its discretion under sec. 3(a) of the Wagner-Peyser Act to establish minimum levels of efficiency and promote the uniform administration of labor exchange services by requiring the use of State merit staff to deliver labor exchange services, the Department has determined that alignment of ES and UI staffing is needed to ensure that quality services are delivered effectively and equitably to UI beneficiaries and other ES customers.

The Department is also proposing amendments to the regulations governing ES labor exchange services provided to MSFWs, the Monitor Advocate System, and the Complaint System. These amendments would remove redundancies, clarify requirements, and enhance equity and inclusion for farmworkers in the ES system.

#### **4. Summary**

Exhibit 1 shows the annualized rule familiarization costs, IC costs, and transfer payments at discount rates of 3 percent and 7 percent. The proposed rule is expected to have first-year rule familiarization costs of \$4,439 in 2020 dollars, first-year IC costs of \$10.0 million in 2020 dollars, and first-year transfer payments of \$10.1 million in 2020 dollars. Over the 10-year analysis period, the annualized rule familiarization costs are estimated at \$591 at a discount rate of 7 percent in 2020 dollars, the annualized IC costs are estimated at \$9.8 million at a discount rate of 7 percent in 2020 dollars, and annualized transfer payments are estimated at \$10.1 million at a discount rate of 7 percent in 2020 dollars.

Exhibit 1: Summary of Monetized Costs and Transfers					
Year		Rule Familiarization Costs	Information Collection Costs	Total Costs	Transfers
1	2022	\$ 4,439	\$ 10,029,091	\$ 10,033,529	\$ 10,109,091
2	2023	\$ -	\$ 9,801,091	\$ 9,801,091	\$ 10,109,091
3	2024	\$ -	\$ 9,801,091	\$ 9,801,091	\$ 10,109,091
4	2025	\$ -	\$ 9,801,091	\$ 9,801,091	\$ 10,109,091
5	2026	\$ -	\$ 9,801,091	\$ 9,801,091	\$ 10,109,091
6	2027	\$ -	\$ 9,801,091	\$ 9,801,091	\$ 10,109,091
7	2028	\$ -	\$ 9,801,091	\$ 9,801,091	\$ 10,109,091
8	2029	\$ -	\$ 9,801,091	\$ 9,801,091	\$ 10,109,091
9	2030	\$ -	\$ 9,801,091	\$ 9,801,091	\$ 10,109,091
10	2031	\$ -	\$ 9,801,091	\$ 9,801,091	\$ 10,109,091
Annualized with 7% discounting		\$ 591	\$ 9,831,429	\$ 9,832,020	\$ 10,109,091
Annualized with 3% discounting		\$ 505	\$ 9,827,041	\$ 9,827,546	\$ 10,109,091

Due to data limitations, the Department is unable to quantify transition costs such as recruitment, training, and technology expenses that would be incurred by the four States (i.e., Colorado, Delaware, Massachusetts, and Michigan) that currently have non-State-merit staff providing some ES labor exchange services.

## 5. Regulatory Alternatives

OMB Circular A-4 directs agencies to analyze alternatives if such alternatives best satisfy the philosophy and principles of E.O. 12866. Accordingly, the Department considered the following regulatory alternatives.

### a. Alternative 1

Under this alternative, the Department would return to the pre-2020 Wagner-Peyser Act regulations, reinstituting the State merit-staffing requirement for all States except for the three States previously operating as exceptions: Colorado, Massachusetts, and Michigan. After careful consideration, the Department is not pursuing this alternative. These States operate ES by devolving it to the local level where it can be managed alongside WIOA title I services. While such alignment with WIOA title I has some value, it is outweighed by the benefits of aligning ES staffing with UI administration and adjudication, which would allow ES staff to provide surge capacity for UI administration and adjudication during times of high need. Therefore, the

Department is proposing that all States, including those that previously operated as demonstration States, come into compliance with the merit-staffing requirement.

**b. Alternative 2**

Under this alternative, the Department would require States to come into compliance with the requirement to use State merit staff within 30 or 60 days of issuance of the final rule. The Department is not pursuing this alternative because it could result in significant interruption to ES labor exchange services in the four States not already operating in compliance with the proposed rule. Colorado, Delaware, Massachusetts, and Michigan would need to rapidly shift existing staff or hire new staff and may find themselves in violation of contracts for services negotiated after the 2020 Final Rule. The Department recognizes that this alternative would be a substantial change for those States that have relied on other staffing arrangements and they may need time to make adjustments to personnel, contractual arrangements, and service provision. Accordingly, the Department is proposing to allow those States 18 months from the effective date of the final rule to come into compliance with the merit-staffing requirement rather than stipulating that the States comply immediately.

**B. Regulatory Flexibility Act, Small Business Regulatory Enforcement Fairness Act of 1996, and Executive Order 13272 (Proper Consideration of Small Entities in Agency Rulemaking)**

The Regulatory Flexibility Act (RFA), 5 U.S.C. chapter 6, requires the Department to evaluate the economic impact of this proposed rule on small entities. The RFA defines small entities to include small businesses, small organizations, including not-for-profit organizations, and small governmental jurisdictions. The Department must determine whether the proposed rule would impose a significant economic impact on a substantial number of such small entities. The Department concludes that this proposed rule does not regulate any small entities directly, so any regulatory effect on small entities will be indirect. Accordingly, the Department has determined

this proposed rule would not have a significant economic impact on a substantial number of small entities within the meaning of the RFA.

### **C. Paperwork Reduction Act of 1995**

The purposes of the PRA, 44 U.S.C. 3501 et seq., include minimizing the paperwork burden on affected entities. The PRA requires certain actions before an agency can adopt or revise a collection of information, including publishing for public comment a summary of the collection of information and a brief description of the need for and proposed use of the information.

As part of its continuing effort to reduce paperwork and respondent burden, the Department conducts a preclearance consultation program to provide the public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the PRA. See 44 U.S.C. 3506(c)(2)(A). This activity helps to ensure that the public understands the Department's collection instructions, respondents can provide the requested data in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the Department can properly assess the impact of collection requirements on respondents.

A Federal agency may not conduct or sponsor a collection of information unless approved by OMB under the PRA and displays a currently valid OMB control number. The public is also not required to respond to a collection of information unless it displays a currently valid OMB control number. In addition, notwithstanding any other provisions of law, no person will be subject to penalty for failing to comply with a collection of information if the collection of information does not display a currently valid OMB control number (44 U.S.C. 3512).

In accordance with the PRA, the Department has submitted four ICRs to OMB in concert with the publishing of this proposed rule. This provides the public the opportunity to submit comments on the ICs, either directly to the Department or to OMB. The 60-day period for the public to submit comments begins with the submission of the ICRs to OMB. Comments may be

submitted electronically through <https://www.regulations.gov>. See the **ADDRESSES** section of this proposed rule for more information about submitting comments.

The ICs in this proposed rule are summarized as follows.

*Agency:* DOL–ETA

*Title of Collection:* DOL-Only Performance Accountability, Information, and Reporting System for Reportable Individuals

*Type of Review:* New Collection

*OMB Control Number:* 1205-0NEW

*Description:* The Department is requesting a new OMB control number for this collection. The request for a new control number is for administrative reasons only. The proposed changes to §§ 653.103(a) and 653.109(a)(10) in this rulemaking described subsequently will eventually be included in OMB Control Number 1205–0521. The Department is anticipating that a few different upcoming rulemakings will impact the ICs contained in OMB Control Number 1205–0521. Once all outstanding actions are final and complete, the Department intends to submit a nonmaterial change request to transfer the burden from the new ICR to the existing OMB control number for the DOL-Only Performance Accountability, Information, and Reporting System (1205-0521) and proceed to discontinue the use of the new control number.

This NPRM proposes to add a requirement that SWA Wagner-Peyser programs must document PIRL data element 413 for reportable individuals. The DOL-only PIRL ETA 9172 already requires Wagner-Peyser programs to document data element 413 for participants. This proposed change will help ES staff identify all individuals who engage in ES services who are MSFWs and the degree of their engagement, so that SWAs, SMAs, and the Department may better assess whether all Wagner-Peyser services are provided to MSFWs on an equitable basis. The NPRM also proposes changes to the definitions of migrant farmworker and seasonal farmworker. The Department plans to submit a new ICR that will update ETA 9172 to indicate

that Wagner-Peyser programs must document and keep records of PIRL data element 413 for reportable individuals and align the definitions of migrant farmworker and seasonal farmworker with proposed revisions at § 651.10.

*Affected Public:* State Governments

*Obligation to Respond:* Required to Obtain or Retain Benefits

*Estimated Total Annual Respondents:* 22,687,331

*Estimated Total Annual Responses:* 46,167,618

*Estimated Total Annual Burden Hours:* 10,610,629,971

*Estimated Total Annual Other Burden Costs:* \$9,719,287

*Regulations Sections:* §§ 653.103(a), 653.109(a)(10)

*Agency:* DOL–ETA

*Title of Collection:* Agricultural Recruitment System Forms Affecting Migrant and Seasonal Farmworkers

*Type of Review:* New Collection

*OMB Control Number:* 1205-0NEW

*Description:* This NPRM proposes to add a new IC to address the requirement for SWAs to provide certain workers with checklists summarizing wages, working conditions, and other material specifications. Specifically, pursuant to proposed 20 CFR 653.501(d)(6), ES staff would be required to provide farmworkers with “checklists showing wage payment schedules, working conditions, and other material specifications of the clearance order.” In addition, pursuant to proposed 20 CFR 653.501(d)(10), SWA applicant-holding offices must provide workers referred on clearance orders with a checklist summarizing wages, working conditions and other material specifications in the clearance order. The Department also proposes that this ICR include a new Agricultural Clearance Order Form, ETA Form 790B, which will be attached to the Agricultural Clearance Order Form, ETA Form 790 (see OMB Control Number 1205–0466). The Department previously proposed the ETA Form 790B through OMB Control Number 1205-0134, which is an

expired ICR for which a submission requesting reinstatement is currently pending at OMB. The Department proposes to withdraw OMB Control Number 1205-0134 and to instead attach ETA Form 790B to this ICR because the subjects are related. ETA Form 790B is only used for employers who submit clearance orders requesting U.S. workers for temporary agricultural jobs, which are not attached to requests for foreign workers through the H-2A visa program. ETA is including the estimated burden to the public for the completion of ETA Form 790 in addition to the estimated burden for the ETA Form 790B, because employers would fill out both forms.

*Affected Public:* State Governments, Private Sector: Business or other for-profits, not-for-profit institutions, and farms

*Obligation to Respond:* Required to Obtain or Retain Benefits

*Estimated Total Annual Respondents:* 18,180

*Estimated Total Annual Responses:* 18,180

*Estimated Total Annual Burden Hours:* 11,606

*Estimated Total Annual Other Burden Costs:* \$0

*Regulations Sections:* § 653.501(d)(6) and (10)

*Agency:* DOL–ETA

*Title of Collection:* Migrant and Seasonal Farmworker Monitoring Report and Complaint/Apparent Violation Form

*Type of Review:* Revision

*OMB Control Number:* 1205-0039

*Description:* The proposed rule would require four areas to be changed in this ICR. First, there would be several changes to the required content of the SMA's Annual Summary, described at § 653.108, including a summary of how the SMA is working with the State-level EO Officer, an assurance that the SMA is a senior-level official who reports directly to the State Administrator or their designee, an evaluation of SMA staffing levels, a summary and analysis of outreach efforts, and other minor edits to language used to describe content in the summary. To



implement these proposed changes, the Department also proposes to revise the ETA Form 5148 to include the proposed content. Second, the Department proposes to make two non-substantive corrections to the ETA Form 5148: (1) adding transportation to the types of apparent violations reported in part 1, section E, item 3; and (2) revising part 3, items 2 and 3 so that the field check requirements conform to the existing regulation at § 653.501. The Department is adding transportation to the types of apparent violations because the types of apparent violations listed on the form are intended to exactly mirror the types of complaints reported in section D, item 2. Transportation was inadvertently omitted from the prior ICR revision. Third, the Department proposes to add a new IC to conform with the proposed change to § 653.107(b)(8), which is proposed to require that ES Office Managers maintain MSFW outreach logs on file for at least 3 years, to comply with 2 CFR 200.334. Fourth, the Department proposes to add an IC to this ICR to explain the recordkeeping requirements established at § 658.410(c) regarding maintaining a central complaint log. The Department does not propose to establish a required form, but rather to describe the minimum contents that must be included in any complaint logs SWAs create. In addition, the Department proposes to revise the ETA Form 5148 to conform with proposed revisions to the minimum level of service indicators to request information regarding outreach contacts per quarter as opposed to per week as currently required under § 653.109(h).

*Affected Public:* State Governments

*Obligation to Respond:* Required to Obtain or Retain Benefits

*Estimated Total Annual Respondents:* 5,536

*Estimated Total Annual Responses:* 9,050

*Estimated Total Annual Burden Hours:* 28,240

*Estimated Total Annual Other Burden Costs:* \$0

*Regulations Sections:* 2 CFR 200.334; 20 CFR 653.107(b)(8), 653.108, 653.109(h), and 658.410(c)

*Agency:* DOL-ETA

*Title of Collection:* Wagner-Peyser Employment Service Required Elements for the Unified or Combined State Plan

*Type of Review:* New Collection

*OMB Control Number:* 1205-0NEW

*Description:* The Department is requesting a new OMB control number for this collection. The request for a new control number is for administrative reasons only. The proposed changes in this rulemaking described subsequently will eventually be included in OMB Control Number 1205–0522 (Expires 01/31/2023). As a result of the upcoming expiration date for 1205-0522, the Department will soon begin the process to request an extension for use of the ICR as required under the PRA. Once all outstanding actions are final and complete, the Department intends to submit a nonmaterial change request to transfer the burden from the new ICR to the existing OMB control number for the Required Elements for Submission of the Unified or Combined State Plan and Plan Modifications under the Workforce Innovation and Opportunity Act (1205-0522) and proceed to discontinue the use of the new control number.

The proposed rule would require all States to provide Wagner-Peyser Act ES services through State merit staff. The Department proposes to create a new ICR to require Unified or Combined State Plans to describe how the State will staff labor exchange services under the Wagner-Peyser Act using State merit staff. Similarly, the Department proposes to reinstitute the SWA’s requirement to provide assurances that it will use State merit staff to deliver ES services. The NPRM also proposes several clarifications regarding outreach and significant MSFW one-stop center staffing, including changes to the content of the AOP. The proposed changes will require revision to the AOP instructions.

*Affected Public:* State Governments

*Obligation to Respond:* Required to Obtain or Retain Benefits

*Estimated Total Annual Respondents:* 57 (every 2 years)

*Estimated Total Annual Responses:* 38 (every 2 years)

*Estimated Total Annual Burden Hours:* 8,136 (every 2 years)

*Estimated Total Annual Other Burden Costs:* \$0 (every 2 years)

*Regulations Sections:* §§ 652.215; 653.107(a)(1), (a)(4), (b)(11), and (d)(2)(ii) through (v)

Interested parties may obtain a copy free of charge of one or more of the ICRs submitted to OMB on the OIRA website at <https://www.reginfo.gov/public/do/PRAMain>. From that page, select Department of Labor from the “Currently under Review” dropdown menu, click the “Submit” button, and find the applicable control number among the ICRs displayed.

As noted in the **ADDRESSES** section of this proposed rule, interested parties may send comments about the ICs to the Department, OMB, or both throughout the 60-day comment period. To help ensure appropriate consideration, such comments should mention the applicable OMB control number(s).

The Department and OMB are particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency’s estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (e.g., permitting electronic submission of responses).

#### **D. Executive Order 13132 (Federalism)**

E.O. 13132 requires Federal agencies to ensure that the principles of Federalism animating our Constitution guide the executive departments and agencies in the formulation and

implementation of policies and to further the policies of the Unfunded Mandates Reform Act of 1995 (UMRA). Further, agencies must strictly adhere to constitutional principles. Agencies must closely examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and they must carefully assess the necessity for any such action. To the extent practicable, State and local officials must be consulted before any such action is implemented. The Department has reviewed the proposed rule in light of these requirements and has concluded that it is properly premised on the statutory authority given to the Secretary to set standards under the Wagner-Peyser Act.

Accordingly, the Department has reviewed this proposed rule and has concluded that the rulemaking has no substantial direct effects on States, the relationship between the National Government and the States, or the distribution of power and responsibilities among the various levels of government as described by E.O. 13132. Therefore, the Department has concluded that this proposed rule does not have a sufficient Federalism implication to require further agency action or analysis.

#### **E. Unfunded Mandates Reform Act of 1995**

Title II of UMRA, Pub. L. 104-4, requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a final agency rule that may result in an expenditure of \$100 million or more (adjusted annually for inflation with the base year 1995) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector. This proposed rule, if finalized, does not exceed the \$100 million expenditure in any one year when adjusted for inflation. Therefore, the requirements of title II of UMRA do not apply, and the Department has not prepared a statement under UMRA.

#### **F. Executive Order 13175 (Indian Tribal Governments)**

The Department has reviewed this proposed rule under the terms of E.O. 13175 and DOL's Tribal Consultation Policy and has concluded that the changes to regulatory text would not have tribal implications. These changes do not have substantial direct effects on one or more

Indian tribes, the relationship between the Federal government and Indian tribes, nor the distribution of power and responsibilities between the Federal government and Tribal Governments.

### **G. Plain Language**

E.O. 12866, E.O. 13563, and the Presidential Memorandum of June 1, 1998 (Plain Language in Government Writing), direct executive departments and agencies to use plain language in all rulemaking documents published in the *Federal Register*. The goal is to make the government more responsive, accessible, and understandable in its communications with the public. Accordingly, the Department drafted this NPRM in plain language.

## **List of Subjects**

### **20 CFR Part 651**

Employment, Grant programs—labor.

### **20 CFR Part 652**

Employment, Grant programs—labor, Reporting and recordkeeping requirements.

### **20 CFR Part 653**

Agriculture, Employment, Equal employment opportunity, Grant programs—labor, Migrant labor, Reporting and recordkeeping requirements.

### **20 CFR Part 658**

Administrative practice and procedure, Employment, Grant programs—labor, Reporting and recordkeeping requirements.

For the reasons discussed in the preamble, the Department of Labor proposes to amend 20 CFR parts 651, 652, 653, and 658, as follows:

## **PART 651—GENERAL PROVISIONS GOVERNING THE WAGNER-PEYSER ACT EMPLOYMENT SERVICE**

1. The authority citation for part 651 continues to read as follows:

Authority: 29 U.S.C. 49a; 38 U.S.C. part III, 4101, 4211; Secs. 503, 3, 189, Pub. L. 113-128, 128 Stat. 1425 (Jul. 22, 2014).

2. Amend § 651.10 by:
  - a. Revising the introductory text;
  - b. Adding in alphabetical order a definition for “Apparent violation”;
  - c. Revising the definitions of “Applicant holding office,” “Bona fide occupational qualification (BFOQ),” “Career services,” “Clearance order,” “Complaint System Representative,” “Decertification,” “Employment and Training Administration (ETA),” “Employment Service (ES) office,” “Employment Service (ES) Office Manager,” “Employment Service (ES) staff,” “Field checks,” “Field visits,” “Hearing Officer,” “Interstate clearance order,” “Intrastate clearance order,” and “Migrant farmworker”;
  - d. Removing the definition of “Migrant food processing worker”;
  - e. Revising the definitions of “Occupational Information Network (O\*NET),” “O\*NET-SOC,” “Outreach staff,” “Participant,” “Placement,” “Reportable individual,” “Respondent,” “Seasonal farmworker,” “Significant MSFW one-stop centers,” and “Significant MSFW States”;
  - f. Removing the definitions of “Significant multilingual MSFW one-stop centers” and “State Workforce Agency (SWA) official”; and
  - g. Revising the definition of “Wagner-Peyser Act Employment Service (ES) also known as Employment Service (ES).”

The addition and revisions read as follows:

**§ 651.10 Definitions of terms used in this part and parts 652, 653, 654, and 658 of this chapter.**

In addition to the definitions set forth in sec. 3 of the Workforce Innovation and Opportunity Act (WIOA), codified at 29 U.S.C. 3101 et seq., the following definitions apply to the regulations in parts 652, 653, 654, and 658 of this chapter:

\* \* \* \* \*

*Apparent violation* means a suspected violation of employment-related laws or employment service (ES) regulations, as set forth in § 658.419 of this chapter.

*Applicant holding office* means an ES office that is in receipt of a clearance order and has access to U.S. workers who may be willing and available to perform farmwork on less than year-round basis.

\* \* \* \* \*

*Bona fide occupational qualification (BFOQ)* means that an employment decision or request based on age, sex, national origin, or religion is based on a finding that such characteristic is necessary to the individual's ability to perform the job in question. Since a BFOQ is an exception to the general prohibition against discrimination on the basis of age, sex, national origin, or religion, it must be interpreted narrowly in accordance with the Equal Employment Opportunity Commission regulations set forth at 29 CFR parts 1604, 1605, and 1627.

*Career services* means the services described in sec. 134(c)(2) of WIOA and § 678.430 of this chapter.

*Clearance order* means a job order that is processed through the clearance system under the Agricultural Recruitment System (ARS) at part 653, subpart F, of this chapter.

\* \* \* \* \*

*Complaint System Representative* means a trained ES staff individual who is responsible for processing complaints.

*Decertification* means the rescission by the Secretary of Labor (Secretary) of the year-end certification made under sec. 7 of the Wagner-Peyser Act to the Secretary of the Treasury that the State agency may receive funds authorized by the Wagner-Peyser Act.

\* \* \* \* \*

*Employment and Training Administration (ETA)* means the component of the Department that administers Federal government job training and worker dislocation programs, Federal

grants to States for public ES programs, and unemployment insurance benefits. These services are provided primarily through State and local workforce development systems.

\* \* \* \* \*

*Employment Service (ES) office* means a site that provides ES services as a one-stop partner program. A site must be colocated in a one-stop center consistent with the requirements of §§ 678.305 through 678.315 of this chapter.

*Employment Service (ES) Office Manager* means the ES staff person in charge of ES services provided in a one-stop center.

\* \* \* \* \*

*Employment Service (ES) staff* means State government personnel who are employed according to the merit-system principles described in 5 CFR part 900, subpart F—Standards for a Merit System of Personnel Administration, and who are funded, in whole or in part, by Wagner-Peyser Act funds. ES staff includes a State Workforce Agency (SWA) official.

\* \* \* \* \*

*Field checks* means unannounced appearances by ES staff and/or other State or Federal staff at agricultural worksites to which ES placements have been made through the intrastate or interstate clearance system to ensure that conditions are as stated on the clearance order and that the employer is not violating an employment-related law.

*Field visits* means announced appearances by State Monitor Advocates, Regional Monitor Advocates, the National Monitor Advocate (or National Monitor Advocate team member(s)), or outreach staff to the working and living areas of migrant and seasonal farmworkers (MSFWs), to discuss ES services, farmworker rights and protections, and other employment-related programs with MSFWs, crew leaders, and employers. Monitor Advocates or outreach staff must keep records of each such visit.

\* \* \* \* \*



*Hearing Officer* means a Department Administrative Law Judge, designated to preside at Department administrative hearings.

\* \* \* \* \*

*Interstate clearance order* means an agricultural clearance order for temporary employment (employment on a less than year-round basis) describing one or more hard-to-fill job openings, which an ES office uses to request recruitment assistance from other ES offices in a different State.

*Intrastate clearance order* means an agricultural clearance order for temporary employment (employment on a less than year-round basis) describing one or more hard-to-fill job openings, which an ES office uses to request recruitment assistance from all other ES offices within the State.

\* \* \* \* \*

*Migrant farmworker* means a seasonal farmworker (as defined in this section) who travels to the job site so that the farmworker is not reasonably able to return to their permanent residence within the same day.

\* \* \* \* \*

*Occupational Information Network (O\*NET)* means the online reference database which contains detailed descriptions of U.S. occupations, distinguishing characteristics, classification codes, and information on tasks, knowledge, skills, abilities, and work activities as well as information on interests, work styles, and work values.

\* \* \* \* \*

*O\*NET-SOC* means the occupational codes and titles used in the O\*NET system, based on and grounded in the Standard Occupational Classification (SOC), which are the titles and codes utilized by Federal statistical agencies to classify workers into occupational categories for the purpose of collecting, calculating, and disseminating data. The SOC system is issued by the Office of Management and Budget and the Department is authorized to develop additional

detailed O\*NET occupations within existing SOC categories. The Department uses O\*NET-SOC titles and codes for the purposes of collecting descriptive occupational information and for State reporting of data on training, credential attainment, and placement in employment by occupation.

\* \* \* \* \*

*Outreach staff* means ES staff with the responsibilities described in § 653.107(b) of this chapter. State Monitor Advocates are not considered outreach staff.

*Participant* means a reportable individual who has received services other than the services described in § 677.150(a)(3) of this chapter, after satisfying all applicable programmatic requirements for the provision of services, such as eligibility determination. (See § 677.150(a) of this chapter.)

(1) The following individuals are not Participants, subject to § 677.150(a)(3)(ii) and (iii) of this chapter:

- (i) Individuals who only use the self-service system; and
- (ii) Individuals who receive information-only services or activities.

(2) ES participants must be included in the program's performance calculations.

*Placement* means the hiring by a public or private employer of an individual referred by the ES office for a job or an interview, provided that the ES office completed all the following steps:

(1) Prepared a job order form prior to referral, except in the case of a job development contact on behalf of a specific participant;

(2) Made prior arrangements with the employer for the referral of an individual or individuals;

(3) Referred an individual who had not been specifically designated by the employer, except for referrals on agricultural job orders for a specific crew leader or worker;

(4) Verified from a reliable source, preferably the employer, that the individual had entered on a job; and

(5) Appropriately recorded the placement.

\* \* \* \* \*

*Reportable individual* means an individual who has taken action that demonstrates an intent to use ES services and who meets specific reporting criteria of the Wagner-Peyser Act (see § 677.150(b) of this chapter), including:

- (1) Individuals who provide identifying information;
- (2) Individuals who only use the self-service system; or
- (3) Individuals who only receive information-only services or activities.

*Respondent* means the individual or entity alleged to have committed the violation described in the complaint, such as the employer, service provider, or State agency.

*Seasonal farmworker* means an individual who is employed, or was employed in the past 12 months, in farmwork (as defined in this section) of a seasonal or other temporary nature and is not required to be absent overnight from their permanent place of residence. Labor is performed on a seasonal basis where, ordinarily, the employment pertains to or is of the kind exclusively performed at certain seasons or periods of the year and which, from its nature, may not be continuous or carried on throughout the year. Workers who move from one seasonal activity to another, while employed in farmwork, are employed on a seasonal basis even though they may continue to be employed during a major portion of the year. Workers are employed on a temporary basis where they are employed for a limited time only or their performance is contemplated for a particular piece of work, usually of short duration. Generally, employment which is contemplated to continue indefinitely is not temporary.

\* \* \* \* \*

*Significant MSFW one-stop centers* are those designated by the Department and include those ES offices where MSFWs account for 10 percent or more of annual participants or

reportable individuals in ES and those local ES offices that the administrator determines must be included due to special circumstances such as an estimated large number of MSFWs in the service area. In no event may the number of significant MSFW one-stop centers be less than 100 centers on a nationwide basis.

*Significant MSFW States* are those States designated by the Department and must include the 20 States with the highest estimated number of MSFWs.

\* \* \* \* \*

*Wagner-Peyser Act Employment Service (ES) also known as Employment Service (ES)* means the national system of public ES offices described under the Wagner-Peyser Act. ES services are delivered through a nationwide system of one-stop centers, managed by SWAs and the various local offices of the SWAs, and funded by the United States Department of Labor.

\* \* \* \* \*

## **PART 652—ESTABLISHMENT AND FUNCTIONING OF STATE EMPLOYMENT SERVICE**

3. The authority citation for part 652 continues to read as follows:

Authority: 29 U.S.C. 491-2; Secs. 189 and 503, Public Law 113-128, 128 Stat. 1425 (Jul. 22, 2014).

4. Amend § 652.8 by revising paragraphs (h), introductory text of paragraph (j), (j)(2), and (3) to read as follows:

### **§ 652.8 Administrative provisions.**

\* \* \* \* \*

(h) *Other violations.* Violations or alleged violations of the Wagner-Peyser Act, regulations, or grant terms and conditions except those pertaining to audits or discrimination must be determined and processed in accordance with part 658, subpart H, of this chapter.

\* \* \* \* \*

(j) *Nondiscrimination requirements.* States must:

(1) \* \* \*

(2) Assure that discriminatory job orders will not be accepted, except where the stated requirement is a bona fide occupational qualification (BFOQ). See, generally, 42 U.S.C. 2000e-(2)(e) and 29 CFR parts 1604, 1606, and 1625.

(3) Assure that ES offices are in compliance with the veteran referral and job listing requirements at 41 CFR 60-300.84.

\* \* \* \* \*

5. Revise the heading for Subpart C to read as follows:

**Subpart C—Employment Service Services in a One-Stop Delivery System Environment**

6. Amend § 652.204 by revising the section heading and the first sentence to read as follows:

**§ 652.204 Must funds authorized under the Governor’s Reserve flow through the one-stop delivery system?**

No, sec. 7(b) of the Wagner-Peyser Act provides that 10 percent of the State’s allotment under the Wagner-Peyser Act is reserved for use by the Governor for performance incentives, supporting exemplary models of service delivery, professional development and career advancement of ES staff as applicable, and services for groups with special needs. \* \* \*

7. Amend § 652.205 by revising paragraph (b)(3) to read as follows:

**§ 652.205 May funds authorized under the Wagner-Peyser Act be used to supplement funding for labor exchange programs authorized under separate legislation?**

\* \* \* \* \*

(b) \* \* \*

(3) The activity provides services that are coordinated with ES services; and

\* \* \* \* \*

8. Amend § 652.207 by revising the section heading and paragraph (a) to read as follows:

**§ 652.207 How does a State meet the requirement for universal access to Employment Service services?**

(a) A State has discretion in how it meets the requirement for universal access to ES services. In exercising this discretion, a State must meet the Wagner-Peyser Act's requirements.

\* \* \* \* \*

9. Revise § 652.215 to read as follows:

**§ 652.215 What staffing models must be used to deliver services in the Employment Service?**

(a) *Staffing requirement.* The Secretary requires that the labor exchange services described in § 652.3 be provided by ES staff, as defined in part 651 of this chapter.

(b) *Effective date.* This section becomes effective [60 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER].

(c) *Compliance date.* All obligations in this section become enforceable [18 MONTHS AFTER EFFECTIVE DATE OF THE FINAL RULE].

**PART 653—SERVICES OF THE WAGNER-PEYSER ACT EMPLOYMENT SERVICE SYSTEM**

10. The authority citation for part 653 continues to read as follows:

Authority: Secs. 167, 189, 503, Public Law 113-128, 128 Stat. 1425 (Jul. 22, 2014); 29 U.S.C. chapter 4B; 38 U.S.C. part III, chapters 41 and 42.

11. Amend § 653.100 by revising paragraph (a) to read as follows:

**§ 653.100 Purpose and scope of subpart.**

(a) This subpart sets forth the principal regulations of the Wagner-Peyser Act Employment Service (ES) concerning the provision of services for MSFWs consistent with the requirement that all services of the workforce development system be available to all job seekers in an equitable and nondiscriminatory fashion. This includes ensuring MSFWs have access to these services in a way that meets their unique needs. MSFWs must receive services on a basis

which is qualitatively equivalent and quantitatively proportionate to services provided to non-MSFWs.

\* \* \* \* \*

12. Revise § 653.101 to read as follows:

**§ 653.101 Provision of services to migrant and seasonal farmworkers.**

SWAs must ensure that ES staff at one-stop centers offer MSFWs the full range of career and supportive services, benefits and protections, and job and training referral services as are provided to non-MSFWs. SWAs must ensure ES staff at the one-stop centers tailor such ES services in a way that accounts for individual MSFW preferences, needs, skills, and the availability of job and training opportunities, so that MSFWs are reasonably able to participate in the ES.

13. Amend § 653.102 by revising the third sentence and removing the fourth sentence to read as follows:

**§ 653.102 Job information.**

\* \* \* SWAs must ensure ES staff at one-stop centers provide assistance to MSFWs to access job order information easily and efficiently.

14. Amend § 653.103 by revising paragraphs (a) through (c) to read as follows:

**§ 653.103 Process for migrant and seasonal farmworkers to participate in workforce development activities.**

(a) Each ES office must determine whether participants and reportable individuals are MSFWs as defined at § 651.10 of this chapter.

(b) SWAs must comply with the language access and assistance requirements at 29 CFR 38.9 with regard to all limited English proficient (LEP) individuals, including MSFWs who are LEP individuals, as defined at 29 CFR 38.4(hh). This includes ensuring ES staff comply with these language access and assistance requirements.

(c) One-stop centers must provide MSFWs a list of available career and supportive services.

\* \* \* \* \*

15. Amend § 653.107 by:

- a. Revising the section heading and paragraphs (a)(1), (a)(2)(i) and (ii), and (a)(3)(i);
- b. Adding paragraphs (a)(3)(i)(A) and (B); and
- c. Revising paragraphs (a)(3)(ii), (a)(4), the first sentence of (a)(5), introductory text of paragraph (b), (b)(1), (b)(3), introductory text of (b)(4), (b)(4)(i) and (vi), (b)(7), the second sentence of (b)(8), and paragraphs (b)(11), (d)(2)(ii) through (v), and (d)(4) and (5).

The revisions and additions read as follows:

**§ 653.107 Outreach responsibilities and Agricultural Outreach Plan.**

(a) \* \* \*

(1) Each SWA must ensure outreach staff conduct outreach as described in paragraph (b) of this section on an ongoing basis. SWA Administrators must ensure State Monitor Advocates (SMAs) and outreach staff coordinate activities with WIOA title I sec. 167 grantees as well as with public and private community service agencies and MSFW groups. WIOA title I sec. 167 grantees' activities involving MSFWs does not substitute for SWA outreach responsibilities.

(2) \* \* \*

- (i) Communicate the full range of workforce development services to MSFWs; and
- (ii) Conduct thorough outreach efforts with extensive follow-up activities identified at paragraph (b)(5) of this section.

(3) When hiring or assigning outreach staff:

- (i) SWAs must seek and put a strong emphasis on hiring and assigning qualified candidates who speak the language of a significant proportion of the State MSFW population; and

(A) Who are from MSFW backgrounds; or



(B) Who have substantial work experience in farmworker activities.

(ii) SWAs must inform farmworker organizations and other organizations with expertise concerning MSFWs of job openings and encourage them to refer qualified applicants to apply.

(4) Each SWA must employ an adequate number of outreach staff to conduct MSFW outreach in each area of the State to contact a majority of MSFWs in all of the SWA's service areas annually. In the 20 States with the highest estimated year-round MSFW activity, as identified by the Department, there must be full-time, year-round outreach staff to conduct outreach duties. Full-time means each individual outreach staff person must spend 100 percent of their time on the outreach responsibilities described in paragraph (b) of this section. For the remainder of the States, there must be year-round part-time outreach staff, and during periods of the highest MSFW activity, there must be full-time outreach staff. These staffing levels must align with and be supported by information about the estimated number of farmworkers in the State and the farmworker activity in the State as demonstrated in the State's Agricultural Outreach Plan (AOP) pursuant to paragraph (d) of this section. All outreach staff must be multilingual, if warranted by the characteristics of the MSFW population in the State, and must spend a majority of their time in the field.

(5) The SWA must publicize the availability of ES services through such means as newspaper and electronic media publicity. \* \* \*

\* \* \* \* \*

(b) *Outreach staff responsibilities.* Outreach staff must locate and contact MSFWs who are not being reached by the normal intake activities conducted by the ES offices. Outreach staff responsibilities include the activities identified in paragraphs (b)(1) through (11) of this section.

(1) Outreach staff must explain to MSFWs at their working, living, or gathering areas (including day-haul sites), by means of written and oral presentations either spontaneous or recorded, the following: \* \* \*

\* \* \* \* \*

(3) After making the presentation, outreach staff must urge the MSFWs to go to the local one-stop center to obtain the full range of employment and training services.

(4) If an MSFW cannot or does not wish to visit the local one-stop center, outreach staff must offer to provide on-site the following:

(i) Assistance in the preparation of applications for ES services;

\* \* \* \* \*

(vi) As needed, assistance in making appointments and arranging transportation for individual MSFW(s) or members of their family to and from local one-stop centers or other appropriate agencies.

\* \* \* \* \*

(7) Outreach staff must be trained in one-stop center procedures and in the services, benefits, and protections afforded MSFWs by the ES, including training on protecting farmworkers against sexual harassment, sexual coercion, assault, and human trafficking. Such trainings are intended to help outreach staff identify when such issues may be occurring in the fields and how to document and refer the cases to the appropriate enforcement agencies. Outreach staff also must be trained in the Complaint System procedures at part 658, subpart E, of this chapter and be aware of the local, State, regional, and national enforcement agencies that would be appropriate to receive referrals. The program for such training must be formulated by the State Administrator, pursuant to uniform guidelines developed by ETA. The SMA must be given an opportunity to review and comment on the State's program.

(8) \* \* \* These records must include a daily log, a copy of which must be sent monthly to the ES Office Manager and maintained on file for at least 3 years. \* \* \*

\* \* \* \* \*

(11) Outreach staff in significant MSFW one-stop centers must conduct especially vigorous outreach in their service areas. Outreach activities must align with and be supported by information provided in the State's AOP pursuant to paragraph (d) of this section.

\* \* \* \* \*

(d) \* \* \*

(2) \* \* \*

(ii) Explain the materials, tools, and resources the State will use for outreach;

(iii) Describe the SWA's proposed outreach activities to contact MSFWs who are not being reached by the normal intake activities conducted by the one-stop centers, including identifying the number of full-time and part-time outreach staff positions in the State and demonstrating that there is sufficient outreach staff to contact a majority of MSFWs in all the State's service areas annually;

(iv) Describe the activities planned for providing the full range of ES services to the agricultural community, including both MSFWs and agricultural employers, through the one-stop centers; and

(v) Include a description of how the SWA intends to provide ES staff in significant MSFW one-stop centers in accordance with § 653.111.

\* \* \* \* \*

(4) The AOP must be submitted in accordance with paragraph (d)(1) of this section and planning guidance issued by the Department.

(5) The Annual Summaries required at § 653.108(u) must update the Department on the SWA's progress toward meeting the objectives set forth in the AOP.

\*\*\*\*\*

16. Revise § 653.108 to read as follows:

**§ 653.108 State Workforce Agency and State Monitor Advocate responsibilities.**

(a) State Administrators must ensure their SWAs monitor their own compliance with ES regulations in serving MSFWs on an ongoing basis. The State Administrator has overall responsibility for SWA self-monitoring. The State Administrator and ES staff must not retaliate

against staff, including the SMA, for self-monitoring or raising any issues or concerns regarding noncompliance with the ES regulations.

(b) The State Administrator must appoint an SMA. The State Administrator must inform farmworker organizations and other organizations with expertise concerning MSFWs of the opening and encourage them to refer qualified applicants to apply. Among qualified candidates, the SWAs must seek and put a strong emphasis on hiring persons:

- (1) Who are from MSFW backgrounds; or
- (2) Who speak the language of a significant proportion of the State MSFW population; or
- (3) Who have substantial work experience in farmworker activities.

(c) The SMA must be an individual who:

- (1) Is a senior-level ES staff employee;
- (2) Reports directly to the State Administrator or State Administrator's designee, such as a director or other appropriately titled official in the State Administrator's office, who has the authority to act on behalf of the State Administrator, except that if a designee is selected, they must not be the individual who has direct program oversight of the ES; and

(3) Has the knowledge, skills, and abilities necessary to fulfill the responsibilities as described in this subpart.

(d) The SMA must have sufficient authority, staff, resources, and access to top management to monitor compliance with the ES regulations. Staff assigned to the SMA are intended to help the SMA carry out the duties set forth in this section and must not perform work that conflicts with any of the SMA's monitoring duties, such as outreach responsibilities required by § 653.107, ARS processing under subpart F of this part, and complaint processing under subpart E of part 658. The number of ES staff positions assigned to the SMA must be determined by reference to the number of MSFWs in the State, (as measured at the time of the peak MSFW population), and the need for monitoring activity in the State.

(e) The SMA must devote full-time staffing to SMA functions. No State may dedicate less than full-time staffing for the SMA position, unless the Regional Administrator, with input from the Regional Monitor Advocate, provides written approval. Any State that proposes less than full-time dedication must demonstrate to the Regional Administrator and Regional Monitor Advocate that all SMA functions can be effectively performed with part-time staffing.

(f) All SMAs and their staff must attend training session(s) offered by the Regional Monitor Advocate(s) and National Monitor Advocate and their team and those necessary to maintain competency and enhance the SMA's understanding of the unique needs of farmworkers. Such trainings must include those identified by the SMA's Regional Monitor Advocate and may include those offered by the Occupational Safety and Health Administration, the Department's Wage and Hour Division, U.S. Equal Employment Opportunity Commission, the Immigrant and Employee Rights Section of the Department of Justice's Civil Rights Division, the Department's Civil Rights Center, and other organizations offering farmworker-related information.

(g) The SMA must provide any relevant documentation requested from the SWA by the Regional Monitor Advocate or the National Monitor Advocate.

(h) The SMA must:

(1) Conduct an ongoing review of the delivery of services and protections afforded by the ES regulations to MSFWs by the SWA and ES offices. This includes:

(i) Monitoring compliance with § 653.111;

(ii) Monitoring the ES services that the SWA and one-stop centers provide to MSFWs to assess whether they are qualitatively equivalent and quantitatively proportionate to the services that the SWA and one-stop centers provide to non-MSFWs; and

(iii) Reviewing the appropriateness of informal resolution of complaints and apparent violations as documented in the complaint logs.

(2) Without delay, must advise the SWA and ES offices of problems, deficiencies, or improper practices in the delivery of services and protections afforded by these regulations and, if warranted, specify the corrective action(s) necessary to address these deficiencies. When the SMA finds corrective action(s) necessary, the ES Office Manager or other appropriate ES staff must develop a corrective action plan in accordance with the requirements identified at paragraph (h)(3)(v) of this section. The SMA also must advise the SWA on means to improve the delivery of services.

(3) Participate in on-site reviews of one-stop centers on a regular basis (regardless of whether or not they are designated significant MSFW one-stop centers) using the procedures set forth in paragraphs (h)(3)(i) through (vii) of this section.

(i) Before beginning an onsite review, the SMA or review staff must study:

(A) Program performance data;

(B) Reports of previous reviews;

(C) Corrective action plans developed as a result of previous reviews;

(D) Complaint logs, as required by the regulations under part 658 of this chapter, including logs documenting the informal resolution of complaints and apparent violations; and

(E) Complaints elevated from the office or concerning the office.

(ii) The SMA must ensure that the onsite review format, developed by ETA, is used as a guideline for onsite reviews.

(iii) Upon completion of an onsite monitoring review, the SMA must hold one or more wrap-up sessions with the ES Office Manager and staff to discuss any findings and offer initial recommendations and appropriate technical assistance.

(iv) After each review, the SMA must conduct an in-depth analysis of the review data. The conclusions, including findings and areas of concern and recommendations of the SMA, must be put in writing and must be sent directly to the State Administrator, to the official of the SWA with authority over the ES office, and other appropriate SWA officials.

(v) If the review results in any findings of noncompliance with the regulations under this chapter, the SMA's report must include the necessary corrective action(s). To resolve the findings, the ES Office Manager or other appropriate ES staff must develop and propose a written corrective action plan. The plan must be approved or revised by SWA officials and the SMA. The plan must include the actions required to correct any compliance issues within 30 business days or, if the plan allows for more than 30 business days for full compliance, the length of and the reasons for the extended period and the major interim steps to correct the compliance issues must be specifically stated. SWAs are responsible for assuring and documenting that the ES office is in compliance within the time period designated in the plan.

(vi) SWAs must submit to the appropriate ETA regional office copies of the onsite review reports and corrective action plans for ES offices.

(vii) The SMA may delegate the review described in paragraph (h)(3) of this section to the SMA's staff, if the SMA finds such delegation necessary. In such event, the SMA is responsible for and must approve the written report of the review.

(4) Ensure all significant MSFW one-stop centers not reviewed onsite by Federal staff are reviewed at least once per year by the SMA or their staff, and that, if necessary, those ES offices in which significant problems are revealed by required reports, management information, the Complaint System, or other means are reviewed as soon as possible.

(5) Review and approve the SWA's AOP.

(6) On a regular basis, review outreach staff's daily logs and other reports including those showing or reflecting the outreach staff's activities.

(7) Write and submit annual summaries to the State Administrator with a copy to the Regional Administrator and the National Monitor Advocate.

(i) The SMA must participate in Federal reviews conducted pursuant to part 658, subpart G, of this chapter, as requested by the Regional or National Monitor Advocate.

(j) The SMA must monitor the performance of the Complaint System, as set forth at §§ 658.400 and 658.401 of this chapter. The SMA must review the ES office's informal resolution of complaints relating to MSFWs and must ensure that the ES Office Manager transmits copies of the Complaint System logs pursuant to part 658, subpart E, of this chapter to the SWA.

(k) The SMA must serve as an advocate to improve services for MSFWs.

(l) The SMA must establish an ongoing liaison with WIOA sec. 167 National Farmworker Jobs Program (NFJP) grantees and other organizations serving farmworkers, employers, and employer organizations in the State.

(m) The SMA must establish an ongoing liaison with the State-level Equal Opportunity (EO) Officer.

(n) The SMA must meet (either in person or by alternative means), at minimum, quarterly, with representatives of the organizations pursuant to paragraphs (l) and (m) of this section, to receive input on improving coordination with ES offices or improving the coordination of services to MSFWs. To foster such collaboration, the SMAs must communicate freely with these organizations. The SMA must also establish Memorandums of Understanding (MOUs) with the NFJP grantees and may establish MOUs with other organizations serving farmworkers as appropriate.

(o) The SMA must conduct frequent field visits to the working, living, and gathering areas of MSFWs, and must discuss the SWA's provision of ES services and other employment-related programs with MSFWs, crew leaders, and employers. Records must be kept of each such field visit.

(p) The SMA must participate in the appropriate regional public meeting(s) held by the Department of Labor Regional Farm Labor Coordinated Enforcement Committee, other Occupational Safety and Health Administration and Wage and Hour Division task forces, and other committees as appropriate.



(q) The SMA must ensure that outreach efforts in all significant MSFW one-stop centers are reviewed at least yearly. This review will include accompanying at least one outreach staff from each significant MSFW one-stop center on field visits to MSFWs' working, living, and/or gathering areas. The SMA must review findings from these reviews with the ES Office Managers.

(r) The SMA must review on at least a quarterly basis all statistical and other MSFW-related data reported by ES offices in order:

- (1) To determine the extent to which the SWA has complied with the ES regulations; and
- (2) To identify the areas of non-compliance.

(s) The SMA must have full access to all statistical and other MSFW-related information gathered by SWAs and ES offices and may interview ES staff with respect to reporting methods. After each review, the SMA must consult, as necessary, with the SWA and ES offices and provide technical assistance to ensure accurate reporting.

(t) The SMA must review and comment on proposed State ES directives, manuals, and operating instructions relating to MSFWs and must ensure:

- (1) That they accurately reflect the requirements of the regulations; and
- (2) That they are clear and workable. The SMA also must explain and make available at the requestor's cost, pertinent directives and procedures to employers, employer organizations, farmworkers, farmworker organizations, and other parties expressing an interest in a readily identifiable directive or procedure issued and receive suggestions on how these documents can be improved.

(u) The SMA must prepare for the State Administrator, the Regional Monitor Advocate, and the National Monitor Advocate an Annual Summary describing how the State provided ES services to MSFWs within the State based on statistical data, reviews, and other activities as required in this chapter. The summary must include:

(1) A description of the activities undertaken during the program year by the SMA pertaining to their responsibilities set forth in this section and other applicable regulations in this chapter.

(2) An assurance that the SMA is a senior-level official who reports directly to the State Administrator or the State Administrator's designee as described at paragraph (c) of this section.

(3) An evaluation of SMA staffing levels, including:

(i) An assurance the SMA devotes all of their time to Monitor Advocate functions or, if the SMA conducts their functions on a part-time basis, an assessment of whether all SMA functions are able to be effectively performed on a part-time basis; and

(ii) An assessment of whether the performance of SMA functions requires increased time by the SMA (if part-time) or an increase in the number of ES staff assigned to assist the SMA in the performance of SMA functions, or both.

(4) A summary of the monitoring reviews conducted by the SMA, including:

(i) A description of any problems, deficiencies, or improper practices the SMA identified in the delivery of services;

(ii) A summary of the actions taken by the SWA to resolve the problems, deficiencies, or improper practices described in its service delivery; and

(iii) A summary of any technical assistance the SMA provided for the SWA, ES offices, and outreach staff.

(5) A summary and analysis of the outreach efforts undertaken by all significant and non-significant MSFW ES offices, as well as the results of those efforts, and an analysis of whether the outreach levels and results were adequate.

(6) A summary of the State's actions taken under the Complaint System described in part 658, subpart E, of this chapter, identifying any challenges, complaint trends, findings from reviews of the Complaint System, trainings offered throughout the year, and steps taken to inform MSFWs and employers, and farmworker advocacy groups about the Complaint System.

(7) A summary of how the SMA is working with WIOA sec. 167 NFJP grantees, the State-level EO Officer, and other organizations serving farmworkers, employers, and employer organizations in the State, and an assurance that the SMA is meeting at least quarterly with these individuals and representatives of these organizations.

(8) A summary of the statistical and other MSFW-related data and reports gathered by SWAs and ES offices for the year, including an overview of the SMA's involvement in the SWA's reporting systems.

(9) A summary of the training conducted for ES staff on techniques for accurately reporting data.

(10) A summary of activities related to the AOP and an explanation of whether those activities helped the State reach the objectives described in the AOP. At the end of the 4-year AOP cycle, the summary must include a synopsis of the SWA's achievements over the previous 4 years to accomplish the objectives set forth in the AOP, and a description of the objectives which were not achieved and the steps the SWA will take to address those deficiencies.

(11) For significant MSFW one-stop centers, a summary of the State's efforts to comply with § 653.111.

17. Amend § 653.109 by:

- a. Revising paragraph (b)(9);
- b. Redesignating paragraph (b)(10) as paragraph (b)(11);
- c. Adding a new paragraph (b)(10); and
- d. Revising paragraphs (g), (h), and (h)(1).

The revision, redesignation, and additions read as follows:

**§ 653.109 Data collection and performance accountability measures.**

\* \* \* \* \*

(b) \* \* \*

(9) Agricultural clearance orders (including field checks), MSFW complaints and apparent violations, and monitoring activities;

(10) The number of reportable individuals and participants who are MSFWs; and

(11) Any other data required by the Department.

\* \* \* \* \*

(g) Meet equity indicators that address ES controllable services and include, at a minimum, individuals referred to a job, receiving job development, and referred to supportive or career services.

(h) Meet minimum levels of service in significant MSFW States. That is, only significant MSFW States will be required to meet minimum levels of service to MSFWs. Minimum level of service indicators must include, at a minimum, individuals placed in a job, individuals placed long-term (150 days or more) in a non-agricultural job, a review of significant MSFW ES offices, field checks conducted, outreach contacts per quarter, and processing of complaints. The determination of the minimum service levels required of significant MSFW States must be based on the following:

(1) Past SWA performance in serving MSFWs, as reflected in on-site reviews and data collected under paragraph (b) of this section.

\* \* \* \* \*

18. Amend § 653.110 by revising paragraph (b) to read as follows:

**§ 653.110 Disclosure of data.**

\* \* \* \* \*

(b) If a request for data held by a SWA is made to the ETA national or regional office, ETA must forward the request to the SWA for response.

\* \* \* \* \*

19. Amend § 653.111 by revising the section heading and paragraphs (a) and (b) to read as follows:

**§ 653.111 State Workforce Agency staffing requirements for significant MSFW one-stop centers.**

(a) The SWA must staff significant MSFW one-stop centers in a manner facilitating the delivery of ES services tailored to the unique needs of MSFWs. This includes recruiting qualified candidates who meet the criteria in § 653.107(a)(3).

(b) The SMA, Regional Monitor Advocate, or the National Monitor Advocate, as part of their regular reviews of SWA compliance with these regulations, must monitor the extent to which the SWA has complied with its obligations under paragraph (a) of this section.

\* \* \* \* \*

20. Amend § 653.501 by:

- a. Revising the introductory text of paragraph (a) and paragraph (a)(1);
- b. Adding paragraph (b)(4);
- c. Revising paragraph (c)(3) introductory text; and
- d. Revising the first sentence in the introductory text of paragraph (d)(1) and paragraphs (d)(3), (6), (10), and (11).

The revisions and additions read as follows:

**§ 653.501 Requirements for processing clearance orders.**

(a) *Assessment of need.* No ES staff may place a job order seeking workers to perform farmwork into intrastate or interstate clearance unless:

(1) The ES office and employer have attempted and have not been able to obtain sufficient workers within the local labor market area; or

\* \* \* \* \*

(b) \* \* \*

(4) Prior to placing a job order into intrastate or interstate clearance, ES staff must consult the Department's Office of Foreign Labor Certification and Wage and Hour Division debarment lists. If the employer requesting access to the clearance system is currently debarred or

disqualified from participating in one of the Department's foreign labor certification programs, the SWA must initiate discontinuation of services pursuant to part 658, subpart F of this chapter.

(c) \* \* \*

(3) SWAs must ensure that the employer makes the following assurances in the clearance order: \* \* \*

\* \* \* \* \*

(d) \* \* \*

(1) The order-holding ES office must transmit an electronic copy of the approved clearance order to its SWA. \* \* \*

\* \* \* \* \*

(3) The approval process described in this paragraph does not apply to clearance orders that are attached to applications for foreign temporary agricultural workers pursuant to part 655, subpart B, of this chapter; such clearance orders must be sent to the processing center as directed by ETA in guidance. For noncriteria clearance orders (orders that are not attached to applications under part 655, subpart B, of this chapter), the ETA regional office must review and approve the order within 10 business days of its receipt of the order, and the Regional Administrator or their designee must approve the areas of supply to which the order will be extended. Any denial by the Regional Administrator or their designee must be in writing and state the reasons for the denial.

\* \* \* \* \*

(6) ES staff must assist all farmworkers to understand the terms and conditions of employment set forth in intrastate and interstate clearance orders and must provide such workers with checklists showing wage payment schedules, working conditions, and other material specifications of the clearance order.

\* \* \* \* \*

(10) Applicant-holding offices must provide workers referred on clearance orders with a checklist summarizing wages, working conditions and other material specifications in the

clearance order. The checklist must include language notifying the worker that a copy of the original clearance order is available upon request.

(11) The applicant-holding office must give each referred worker a copy of the list of worker's rights described in Departmental guidance.

\* \* \* \* \*

21. Amend § 653.502 by revising paragraph (d) to read as follows:

**§ 653.502 Conditional access to the Agricultural Recruitment System.**

\* \* \* \* \*

(d) *Notice of denial.* If the Regional Administrator denies the request for conditional access to the intrastate or interstate clearance system they must provide written notice to the employer, the appropriate SWA, and the ES office, stating the reasons for the denial.

\* \* \* \* \*

22. Amend § 653.503 by revising paragraphs (a) and (b) to read as follows:

**§ 653.503 Field checks.**

(a) If a worker is placed on a clearance order, the SWA must notify the employer in writing that the SWA, through its ES offices, and/or Federal staff, must conduct unannounced field checks to determine and document whether wages, hours, transportation, and working and housing conditions are being provided as specified in the clearance order.

(b) Where the SWA has made placements on 10 or more agricultural clearance orders (pursuant to this subpart) during the quarter, the SWA must conduct field checks on at least 25 percent of the total of such orders. Where the SWA has made placements on nine or fewer job orders during the quarter (but at least one job order), the SWA must conduct field checks on 100 percent of all such orders. This requirement must be met on a quarterly basis.

\* \* \* \* \*

**PART 658—ADMINISTRATIVE PROVISIONS GOVERNING THE WAGNER-PEYSER  
ACT EMPLOYMENT SERVICE**

23. Revise the authority citation for part 658 to read as follows:

Authority: Pub. L. 113-128, 128 Stat. 1425 (July 22, 2014); 29 U.S.C. chapter 4B.

24. Amend § 658.400 by revising the second sentence of paragraph (a) and paragraph (d) to read as follows:

**§ 658.400 Purpose and scope of subpart.**

(a) \* \* \* Specifically, the Complaint System processes complaints against an employer about the specific job to which the applicant was referred through the ES and complaints involving the failure to comply with the ES regulations under parts 651, 652, 653, and 654 of this chapter and this part. \* \* \*

\* \* \* \* \*

(d) A complainant may designate an individual to act as their representative.

25. Amend § 658.410 by:

- a. Revising paragraphs (c), (g), (h), (k), and (m);
- b. Removing paragraph (n); and
- c. Redesignating and revising paragraph (o) as paragraph (n).

The revisions and redesignation read as follows:

**§ 658.410 Establishment of local and State complaint systems.**

\* \* \* \* \*

(c) SWAs must ensure centralized control procedures are established for the processing of complaints and apparent violations. The ES Office Manager and the State Administrator must ensure a central complaint log is maintained, listing all complaints taken by the ES office or the SWA and apparent violations identified by ES staff, and specifying for each complaint or apparent violation:

- (1) The name of the complainant (for complaints);



- (2) The name of the respondent (employer or State agency);
- (3) The date the complaint is filed or the apparent violation was identified;
- (4) Whether the complaint is made by or on behalf of a migrant and seasonal farmworker (MSFW) or whether the apparent violation affects an MSFW;
- (5) Whether the complaint or apparent violation concerns an employment-related law or the ES regulations; and
- (6) The actions taken (including any documents the SWA sent or received and the date the SWA took such action(s)), and whether the complaint or apparent violation has been resolved, including informally.

\* \* \* \* \*

(g) All complaints filed through the local ES office must be processed by a trained Complaint System Representative.

(h) All complaints received by a SWA must be assigned to a trained Complaint System Representative designated by the State Administrator. Complaints must not be assigned to the State Monitor Advocate (SMA).

\* \* \* \* \*

(k) The appropriate ES staff processing a complaint must offer to assist the complainant through the provision of appropriate services.

\* \* \* \* \*

(m) Follow-up on unresolved complaints. When an MSFW submits a complaint, the Complaint System Representative must follow-up monthly on the processing of the complaint and must inform the complainant of the status of the complaint. No follow-up with the complainant is required for non-MSFW complaints.

(n) A complainant may designate an individual to act as their representative throughout the filing and processing of a complaint.

26. Amend § 658.411 by:

- a. Revising paragraphs (a)(2)(i) and (ii), (a)(3), the first sentence of paragraph (a)(4), and paragraphs (b)(1), (b)(1)(i), and (b)(1)(ii)(A), (B), (D), and (E);
- b. Adding paragraph (b)(1)(ii)(F); and
- c. Revising paragraphs (c), (d)(1)(i), (d)(1)(ii)(A) through (D), (d)(1)(iii) and (iv), the introductory text of (d)(3), (d)(4), the introductory text of (d)(5)(i) and (ii), (d)(5)(iii)(G), and (d)(6).

The revisions and addition read as follows:

**§ 658.411 Action on complaints.**

(a) \* \* \*

(2) \* \* \*

(i) Make every effort to obtain all the information they perceive to be necessary to investigate the complaint;

(ii) Request that the complainant indicate all of the physical addresses, email addresses, telephone numbers, and any other helpful means by which they might be contacted during the investigation of the complaint; and

\* \* \* \* \*

(3) The staff must ensure the complainant (or their representative) submits the complaint on the Complaint/Referral Form or another complaint form prescribed or approved by the Department or submits complaint information which satisfies paragraph (a)(4) of this section. The Complaint/Referral Form must be used for all complaints, including complaints about unlawful discrimination, except as provided in paragraph (a)(4) of this section. The staff must offer to assist the complainant in filling out the form and submitting all necessary information and must do so if the complainant desires such assistance. If the complainant also represents several other complainants, all such complainants must be named. The complainant, or their representative, must sign the completed form in writing or electronically. The identity of the complainant(s) and any persons who furnish information relating to, or assisting in, an

investigation of a complaint must be kept confidential to the maximum extent possible, consistent with applicable law and a fair determination of the complaint. A copy of the completed complaint submission must be given to the complainant(s), and the complaint form must be given to the appropriate Complaint System Representative described in § 658.410(g).

(4) Any complaint in a reasonable form (letter or email) which is signed by the complainant, or their representative, and includes sufficient information to initiate an investigation must be treated as if it were a properly completed Complaint/Referral Form filed in person. \* \* \*

(b) \* \* \*

(1) When a complaint is filed regarding an employment-related law with an ES office or a SWA, and paragraph (c) of this section does not apply, the office must determine if the complainant is an MSFW.

(i) If the complainant is a non-MSFW, the office must immediately refer the complainant to the appropriate enforcement agency, another public agency, a legal aid organization, and/or a consumer advocate organization, as appropriate, for assistance. Upon completing the referral, the local or State representative is not required to follow-up with the complainant.

(ii) \* \* \*

(A) Take from the MSFW or their representative, in writing (hard copy or electronic), the complaint(s) describing the alleged violation(s) of the employment-related law(s); and

(B) Attempt to resolve the issue informally at the local level, except in cases where the complaint was submitted to the SWA and the Complaint System Representative determines that they must take immediate action or in cases where informal resolution at the local level would be detrimental to the complainant(s). In cases where informal resolution at the local level would be detrimental to the complainant(s), the Complaint System Representative must immediately refer the complaint to the appropriate enforcement agency. Concurrently, the Complaint System

Representative must offer to refer the MSFW to other ES services should the MSFW be interested.

\*\*\*\*\*

(D) If the ES office or SWA Complaint System Representative determines that the complaint must be referred to a State or Federal agency, they must refer the complaint immediately to the appropriate enforcement agency for prompt action.

(E) If the complaint was referred under paragraph (b)(1)(ii)(D) of this section, the representative must notify the complainant of the enforcement agency to which the complaint was referred.

(F) When a complaint alleges an employer in a different State from where the complaint is filed has violated an employment-related law:

(1) The ES office or SWA receiving the complaint must ensure the Complaint/Referral Form is adequately completed and then immediately send a copy of the Complaint/Referral Form and copies of any relevant documents to the SWA in the other State. Copies of the referral letter must be sent to the complainant, and copies of the complaint and referral letter must be sent to the ETA Regional Office(s) with jurisdiction over the transferring and receiving State agencies. All such copies must be sent via hard copy or electronic mail.

(2) The SWA receiving the complaint must process the complaint as if it had been initially filed with that SWA.

(3) The ETA Regional Office with jurisdiction over the receiving SWA must follow up with it to ensure the complaint is processed in accordance with these regulations.

\* \* \* \* \*

(c) *Complaints alleging unlawful discrimination or reprisal for protected activity.* All complaints received under this subpart by an ES office or a SWA alleging unlawful discrimination or reprisal for protected activity in violation of nondiscrimination laws, such as those enforced by the Equal Employment Opportunity Commission (EEOC) or the Department

of Labor's Civil Rights Center (CRC), or in violation of the Immigration and Nationality Act's anti-discrimination provision found at 8 U.S.C. 1324b, must be logged and immediately referred to the State-level EO Officer. The Complaint System Representative must notify the complainant of the referral in writing.

(d) \* \* \*

(1) When an ES complaint is filed with an ES office or a SWA, and paragraph (c) of this section does not apply, the following procedures apply:

(i) When an ES complaint is filed against an employer, the proper office to process the complaint is the ES office serving the area in which the employer is located.

(ii) \* \* \*

(A) The ES office or SWA receiving the complaint must ensure the Complaint/Referral Form is adequately completed, and then immediately send a copy of the Complaint/Referral Form and copies of any relevant documents to the SWA in the other State. Copies of the referral letter must be sent to the complainant, and copies of the complaint and referral letter must be sent to the ETA Regional Office(s) with jurisdiction over the transferring and receiving State agencies. All such copies must be sent via hard copy or electronic mail.

(B) The SWA receiving the complaint must process the complaint as if it had been initially filed with that SWA.

(C) The ETA regional office with jurisdiction over the receiving SWA must follow-up with it to ensure the complaint is processed in accordance with these regulations.

(D) If the complaint is against more than one SWA, the complaint must so clearly state. Additionally, the complaints must be processed as separate complaints and must be processed according to procedures in this paragraph (d).

(iii) When an ES complaint is filed against an ES office, the proper office to process the complaint is the ES office serving the area in which the alleged violation occurred.

(iv) When an ES complaint is filed against more than one ES offices and is in regard to an alleged agency-wide violation, the SWA representative or their designee must process the complaint.

\* \* \* \* \*

(3) When a non-MSFW or their representative files a complaint regarding the ES regulations with a SWA, or when a non-MSFW complaint is referred from an ES office the following procedures apply:

\* \* \* \* \*

(4)(i) When a MSFW or their representative files a complaint regarding the ES regulations directly with a SWA, or when a MSFW complaint is referred from an ES office, the Complaint System Representative must investigate and attempt to resolve the complaint immediately upon receipt and may, if necessary, conduct a further investigation.

(ii) If resolution at the SWA level has not been accomplished within 20 business days after the complaint was received by the SWA (or after all necessary information has been submitted to the SWA pursuant to paragraph (a)(4) of this section), the Complaint System Representative must make a written determination regarding the complaint and must send electronic copies to the complainant and the respondent. The determination must follow the procedures set forth in paragraph (d)(5) of this section.

(5)(i) All written determinations by the SWA on complaints under the ES regulations must be sent by certified mail (or another legally viable method) and a copy of the determination may be sent via electronic mail. The determination must include all the following:

(ii) If the SWA determines that the employer has not violated the ES regulations, the SWA must offer to the complainant the opportunity to request, in writing, a hearing within 20 business days after the certified date of receipt of the notification.

(iii) \* \* \*

(G) With the consent of the SWA and of the State hearing official, the party who requested the hearing may withdraw the request for the hearing in writing before the hearing.

\* \* \* \* \*

(6) A complaint regarding the ES regulations must be processed to resolution by these regulations only if it is made within 2 years of the alleged occurrence.

\* \* \* \* \*

27. Amend § 658.417 by revising paragraph (b) to read as follows:

**§ 658.417 State hearings.**

\* \* \* \* \*

(b) The State hearing official may decide to conduct hearings on more than one complaint concurrently if they determine that the issues are related or that the complaints will be processed more expeditiously if conducted together.

\* \* \* \* \*

28. Amend § 658.419 by revising paragraph (a) to read as follows:

**§ 658.419 Apparent violations.**

(a) If an ES staff member observes, has reason to believe, or is in receipt of information regarding a suspected violation of employment-related laws or ES regulations by an employer, except as provided at § 653.503 of this chapter (field checks) or § 658.411 (complaints), the employee must document the apparent violation and refer this information to the ES Office Manager, who must document the apparent violation in the Complaint System log, as described at § 658.410. Apparent violations of nondiscrimination laws must be processed according to the procedures described in § 658.411(c).

\* \* \* \* \*

29. Amend § 658.420 by revising paragraphs (b) and (c) to read as follows:

**§ 658.420 Responsibilities of the Employment and Training Administration regional office.**

\* \* \* \* \*

(b) The Regional Administrator must designate Department of Labor officials to process ES regulation-related complaints as follows:

(1) All complaints received at the ETA regional office under this subpart that allege unlawful discrimination or reprisal for protected activity in violation of nondiscrimination laws, such as those enforced by the EEOC or CRC, in violation of the Immigration and Nationality Act's anti-discrimination provision found at 8 U.S.C. 1324b, must immediately be logged and immediately referred to the appropriate State-level EO Officer(s).

(2) All complaints other than those described in paragraph (b)(1) of this section must be assigned to a regional office official designated by the Regional Administrator, provided that the regional office official designated to process MSFW complaints must be the Regional Monitor Advocate (RMA).

(c) Except for those complaints under paragraph (b)(1) of this section, the Regional Administrator must designate Department of Labor officials to process employment-related law complaints in accordance with § 658.422, provided that the regional official designated to process MSFW employment-related law complaints must be the RMA. The RMA must follow up monthly on all complaints filed by MSFWs including complaints under paragraph (b)(1) of this section.

\* \* \* \* \*

30. Amend § 658.421 by revising the section heading, the first sentence of paragraph (a)(1), introductory text of (a)(2), the first sentences of paragraphs (a)(2)(i) and (b), and paragraphs (c) and (d) to read as follows:

**§ 658.421 Processing of Wagner-Peyser Act Employment Service regulation-related complaints.**

(a) Except as provided below in paragraph (a)(2) of this section, no complaint alleging a violation of the ES regulations may be processed at the ETA regional office level until the



complainant has exhausted the SWA administrative remedies set forth at §§ 658.411 through 658.418. \* \* \*

(2) If a complaint is submitted directly to the Regional Administrator and if they determine that the nature and scope of a complaint described in paragraph (a) of this section is such that the time required to exhaust the administrative procedures at the SWA level would adversely affect a significant number of individuals, the RA must accept the complaint and take the following action:

(i) If the complaint is filed against an employer, the regional office must process the complaint in a manner consistent with the requirements imposed upon State agencies by §§ 658.411 and 658.418. \* \* \*

\* \* \* \* \*

(b) The ETA regional office is responsible for processing appeals of determinations made on complaints at the SWA level. \* \* \*

(c)(1) Once the Regional Administrator receives a timely appeal, they must request the complete SWA file, including the original Complaint/Referral Form from the appropriate SWA.

(2) The Regional Administrator must review the file in the case and must determine within 10 business days whether any further investigation or action is appropriate; however, if the Regional Administrator determines that they need to request legal advice from the Office of the Solicitor at the U.S. Department of Labor, then the Regional Administrator is allowed 20 business days to make this determination.

(d) If the Regional Administrator determines that no further action is warranted, the Regional Administrator will send their determination in writing to the appellant within 5 days of the determination, with a notification that the appellant may request a hearing before a Department of Labor Administrative Law Judge (ALJ) by filing a hearing request in writing with the Regional Administrator within 20 working days of the appellant's receipt of the notification.

\* \* \* \* \*

31. Amend § 658.422 by revising the section heading and paragraphs (a) through (c) to read as follows:

**§ 658.422 Processing of employment-related law complaints by the Regional Administrator.**

(a) This section applies to all complaints submitted directly to the Regional Administrator or their representative.

(b) Each complaint filed by an MSFW alleging violation(s) of employment-related laws must be taken in writing, logged, and referred to the appropriate enforcement agency for prompt action. If such a complaint alleges a violation of nondiscrimination laws or reprisal for protected activity, it must be referred to the appropriate State-level EO Officer in accordance with § 658.420(b)(1).

(c) Each complaint submitted by a non-MSFW alleging violation(s) of employment-related laws must be logged and referred to the appropriate enforcement agency for prompt action. If such a complaint alleges a violation of nondiscrimination laws or reprisal for protected activity, it must be referred to the appropriate State-level EO Officer in accordance with § 658.420(b)(1).

\* \* \* \* \*

32. Amend § 658.424 by revising paragraph (d) to read as follows:

**§ 658.424 Proceedings before the Office of Administrative Law Judges.**

\* \* \* \* \*

(d) The ALJ may decide to consolidate cases and conduct hearings on more than one complaint concurrently if they determine that the issues are related or that the complaints will be processed more expeditiously.

\* \* \* \* \*

33. Amend § 658.425 by revising paragraph (a)(1) to read as follows:

**§ 658.425 Decision of Department of Labor Administrative Law Judge.**

(a) \* \* \*

(1) Rule that they lack jurisdiction over the case:

\* \* \* \* \*

34. Amend § 658.501 by revising paragraphs (a)(4), (b), and (c) to read as follows:

**§ 658.501 Basis for discontinuation of services.**

(a) \* \* \*

(4) Are found by a final determination by an appropriate enforcement agency to have violated any employment-related laws and notification of this final determination has been provided to the Department or the SWA by that enforcement agency or are currently debarred or disqualified from participating in one of the Department's foreign labor certification programs;

\* \* \* \* \*

(b) SWA officials may discontinue services immediately if, in the judgment of the State Administrator, exhaustion of the administrative procedures set forth in § 658.502 would cause substantial harm to a significant number of workers. In such instances, procedures at §§ 658.503 and 658.504 must be followed.

(c) If it comes to the attention of an ES office or a SWA that an employer participating in the ES may not have complied with the terms of its temporary labor certification, under, for example the H-2A and H-2B visa programs, SWA officials must engage in the procedures for discontinuation of services to employers pursuant to § 658.502 and simultaneously notify the Chicago National Processing Center (CNPC) of the alleged non-compliance for investigation and consideration of ineligibility pursuant to § 655.184 or § 655.73 of this chapter respectively for subsequent temporary labor certification.

\*\*\*\*\*

35. Amend § 658.502 by revising the introductory text of paragraphs (a)(1) through (3), (a)(4), introductory text of (a)(5) through (7), (a)(7)(i) and (iii), and (b) to read as follows:

**§ 658.502 Notification to employers.**

(a) \* \* \*

(1) Where the decision is based on submittal and refusal to alter or to withdraw job orders containing specifications contrary to employment-related laws, the SWA must specify the date the order was submitted, the job order involved, the specifications contrary to employment-related laws and the laws involved. The SWA must notify the employer in writing that all ES services will be terminated in 20 working days unless the employer within that time: \* \* \*

(2) Where the decision is based on the employer's submittal of an order and refusal to provide assurances that the job is in compliance with employment-related laws or to withdraw the order, the SWA must specify the date the order was submitted, the job order involved, and the assurances involved. The employer must be notified that all ES services will be terminated within 20 working days unless the employer within that time: \* \* \*

(3) Where the decision is based on a finding that the employer has misrepresented the terms or conditions of employment specified on job orders or failed to comply fully with assurances made on job orders, the SWA must specify the basis for that determination. The employer must be notified that all ES services will be terminated in 20 working days unless the employer within that time: \* \* \*

(4) Where the decision is based on a final determination by an enforcement agency or the employer is currently debarred or disqualified from participating in one of the Department's foreign labor certification programs, the SWA must specify the enforcement agency's findings of facts and conclusions of law and, if applicable, the time period for which the employer is debarred or disqualified from participating in one of the Department's foreign labor certification programs. The employer must be notified that all ES services will be terminated in 20 working days unless the employer within that time:

(i) Provides adequate evidence that the enforcement agency has reversed its ruling and that the employer did not violate employment-related laws; or

(ii) Provides adequate evidence that the Department's disbarment or disqualification is no longer in effect or will terminate before the employer's anticipated date of need; or

(iii) Provides adequate evidence that the appropriate fines have been paid and/or appropriate restitution has been made; and

(iv) Provides assurances that any policies, procedures, or conditions responsible for the violation have been corrected and the same or similar violations are not likely to occur in the future.

(5) Where the decision is based on a finding of a violation of ES regulations under § 658.411, the SWA must specify the finding. The employer must be notified that all ES services will be terminated in 20 working days unless the employer within that time: \* \* \*

(6) Where the decision is based on an employer's failure to accept qualified workers referred through the clearance system, the SWA must specify the workers referred and not accepted. The employer must be notified that all ES services will be terminated in 20 working days unless the employer within that time: \* \* \*

(7) Where the decision is based on lack of cooperation in the conduct of field checks, the SWA must specify the lack of cooperation. The employer must be notified that all ES services will be terminated in 20 working days unless the employer within that time:

(i) Provides adequate evidence that it did cooperate; or

\* \* \* \* \*

(iii) Provides assurances that it will cooperate in future field checks in further activity; or

\* \* \* \* \*

(b) If the employer chooses to respond pursuant to this section by providing documentary evidence or assurances, it must at the same time request a hearing if such hearing is desired in the event that the SWA does not accept the documentary evidence or assurances as adequate.

\* \* \* \* \*

36. Amend § 658.504 by revising paragraphs (a)(2)(ii) and (b) to read as follow:

**§ 658.504 Reinstatement of services.**

(a) \* \* \*

(2) \* \* \*

(ii) The employer provides adequate evidence that it has responded adequately to any findings of an enforcement agency, SWA, or ETA, including restitution to the complainant and the payment of any fines, that were the basis of the discontinuation of services.

(b) The SWA must notify the employer requesting reinstatement within 20 working days whether its request has been granted. If the State denies the request for reinstatement, the basis for the denial must be specified and the employer must be notified that it may request a hearing within 20 working days.

\* \* \* \* \*

37. Amend § 658.602 by revising paragraphs (f)(2) through (4), (g), introductory text paragraph (j), (j)(8), (l) through (n), introductory text paragraph (o), (p) through (r), introductory text paragraph(s), (s)(2) and (3) to read as follows:

**§ 658.602 Employment and Training Administration National Office responsibility.**

\* \* \* \* \*

(f) \* \* \*

(2) Review the performance of SWAs in providing the full range of ES services to MSFWs;

(3) Take steps to resolve or refer ES-related problems of MSFWs which come to their attention;

(4) Take steps to refer non-ES-related problems of MSFWs which come to their attention;

\* \* \* \* \*

(g) The NMA must be appointed by the Office of Workforce Investment Administrator (Administrator) after informing farmworker organizations and other organizations with expertise concerning MSFWs of the opening and encouraging them to refer qualified applicants to apply through the Federal merit system. Among qualified candidates, determined through merit

systems procedures, individuals must be sought who meet the criteria used in the selection of the SMAs, as provided in SWA self-monitoring requirements at § 653.108(a) of this chapter.

\* \* \* \* \*

(j) The NMA must monitor and assess SWA compliance with ES regulations affecting MSFWs on a continuing basis. Their assessment must consider: \* \* \*

(8) Their personal observations from visits to SWAs, ES offices, agricultural work sites, and migrant camps. In the Annual Report, the NMA must include both a quantitative and qualitative analysis of their findings and the implementation of their recommendations by State and Federal officials, and must address the information obtained from all of the foregoing sources.

\* \* \* \* \*

(l) If the NMA finds the effectiveness of any RMA has been substantially impeded by the Regional Administrator or other regional office official, they must, if unable to resolve such problems informally, report and recommend appropriate actions directly to the OWI Administrator. If the NMA receives information that the effectiveness of any SMA has been substantially impeded by the State Administrator, a State or Federal ES official, or other ES staff, they must, in the absence of a satisfactory informal resolution at the regional level, report and recommend appropriate actions directly to the OWI Administrator.

(m) The NMA must be informed of all proposed changes in policy and practice within the ES, including ES regulations, which may affect the delivery of services to MSFWs. The NMA must advise the Administrator concerning all such proposed changes which may adversely affect MSFWs. The NMA must propose directly to the OWI Administrator changes in ES policy and administration which may substantially improve the delivery of services to MSFWs. They also must recommend changes in the funding of SWAs and/or adjustment or reallocation of the discretionary portions of funding formulae.

(n) The NMA must participate in the review and assessment activities required in this section and §§ 658.700 through 658.711. As part of such participation, the NMA, or if they are unable to participate, an RMA must accompany the National Office review team on National Office on-site reviews. The NMA must engage in the following activities during each State on-site review:

(1) They must accompany selected outreach staff on their field visits.

(2) They must participate in field check(s) of migrant camps or work site(s) where MSFWs have been placed on inter or intrastate clearance orders.

(3) They must contact local WIOA sec. 167 National Farmworker Jobs Program grantees or other farmworker organizations as part of the on-site review and discuss with representatives of these organizations current trends and any other pertinent information concerning MSFWs.

(4) They must meet with the SMA and discuss the full range of the ES services to MSFWs, including monitoring and the Complaint System.

(o) In addition to the duties specified in paragraph (f) of this section, the NMA each year during the harvest season must visit the four States with the highest level of MSFW activity during the prior fiscal year, if they are not scheduled for a National Office on-site review during the current fiscal year, and must: \* \* \*

(p) The NMA must perform duties specified in §§ 658.700 through 765.711. As part of this function, they must monitor the performance of regional offices in imposing corrective action. The NMA must report any deficiencies in performance to the Administrator.

(q) The NMA must establish routine and regular contacts with WIOA sec. 167 National Farmworker Jobs Program grantees, other farmworker organizations and agricultural employers and/or employer organizations. The NMA must attend conferences or meetings of these groups wherever possible and must report to the Administrator and the National Farm Labor Coordinated Enforcement Committee on these contacts when appropriate. The NMA must include in the Annual Report recommendations about how the Department might better



coordinate ES and WIOA sec. 167 National Farmworker Jobs Program services as they pertain to MSFWs.

(r) In the event that any SMA or RMA, enforcement agency, or MSFW group refers a matter to the NMA which requires emergency action, the NMA must assist them in obtaining action by appropriate agencies and staff, inform the originating party of the action taken, and, upon request, provide written confirmation.

(s) Through all the mechanisms provided in this subpart, the NMA must aggressively seek to ascertain and remedy, if possible, systemic deficiencies in the provisions of ES services and protections afforded by these regulations to MSFWs. The NMA must: \* \* \*

(2) Provide technical assistance to ETA regional office and ES staff for administering the Complaint System, and any other ES services as appropriate.

(3) Recommend to the Regional Administrator specific instructions for action by regional office staff to correct any ES-related systemic deficiencies. Prior to any ETA review of regional office operations concerning ES services to MSFWs, the NMA must provide to the Regional Administrator a brief summary of ES-related services to MSFWs in that region and their recommendations for incorporation in the regional review materials as the Regional Administrator and ETA reviewing organization deem appropriate.

\* \* \* \* \*

38. Amend § 658.603 by revising paragraphs (d)(7), (f)(1) through (3), (g), (i), introductory text of paragraph (k) , (k)(7) and (8), (m), (n)(2) and (3), (o)(1), (p), (q), and (s) through (v) to read as follows:

**§ 658.603 Employment and Training Administration regional office responsibility.**

\* \* \* \* \*

(d) \* \* \*

(7) Unannounced field checks of a sample of agricultural work sites to which ES placements have been made through the clearance system to determine and document whether

wages, hours, and working and housing conditions are as specified on the clearance order. If regional office staff find reason to believe that conditions vary from clearance order specifications, findings must be documented on the Complaint/Apparent Violation Referral Form and provided to the State Workforce Agency to be processed as an apparent violation under § 658.419.

\* \* \* \* \*

(f) \* \* \*

- (1) Review the effective functioning of the SMAs in their region;
- (2) Review the performance of SWAs in providing the full range of ES services to MSFWs;
- (3) Take steps to resolve ES-related problems of MSFWs which come to their attention;

\* \* \* \* \*

(g) The RMA must be appointed by the Regional Administrator after informing farmworker organizations and other organizations in the region with expertise concerning MSFWs of the opening and encouraging them to refer qualified applicants to apply through the Federal merit system. The RMA must have direct personal access to the Regional Administrator wherever they find it necessary. Among qualified candidates, individuals must be sought who meet the criteria used in the selection of the SMAs, as provided in § 653.108(b) of this chapter.

\* \* \* \* \*

(i) The RMA must participate in training sessions including those offered by the National Office and those necessary to maintain competency and enhance their understanding of issues farmworkers face (including trainings offered by OSHA, WHD, EEOC, CRC, and other organizations offering farmworker-related information).

\* \* \* \* \*

(k) At the ETA regional level, the RMA must have primary responsibility for ensuring SWA compliance with ES regulations as it pertains to services to MSFWs is monitored by the

regional office. They must independently assess on a continuing basis the provision of ES services to MSFWs, seeking out and using: \* \* \*

(7) Any other pertinent information which comes to their attention from any possible source.

(8) In addition, the RMA must consider their personal observations from visits to ES offices, agricultural work sites, and migrant camps.

\* \* \* \* \*

(m) The Regional Administrator's quarterly report to the National Office must include the RMA's summary of their independent assessment as required in paragraph (f)(5) of this section. The fourth quarter summary must include an Annual Summary from the region. The summary also must include both a quantitative and a qualitative analysis of their reviews and must address all the matters with respect to which they have responsibilities under these regulations.

(n) \* \* \*

(2) Is being impeded in fulfilling their duties; or

(3) Is making recommendations that are being consistently ignored by SWA officials. If the RMA believes that the effectiveness of any SMA has been substantially impeded by the State Administrator, other State agency officials, any Federal officials, or other ES staff, the RMA must report and recommend appropriate actions to the Regional Administrator. Copies of the recommendations must be provided to the NMA electronically or in hard copy.

(o)(1) The RMA must be informed of all proposed changes in policy and practice within the ES, including ES regulations, which may affect the delivery of services to MSFWs. They must advise the Regional Administrator on all such proposed changes which, in their opinion, may adversely affect MSFWs or which may substantially improve the delivery of services to MSFWs.

\* \* \* \* \*

(p) The RMA must participate in the review and assessment activities required in this section and §§ 658.700 through 658.711. The RMA, an assistant, or another RMA must participate in National Office and regional office on-site statewide reviews of ES services to MSFWs in States in the region. The RMA must engage in the following activities in the course of participating in an on-site SWA review:

(1) Accompany selected outreach staff on their field visits;

(2) Participate in a field check of migrant camps or work sites where MSFWs have been placed on intrastate or interstate clearance orders;

(3) Contact local WIOA sec. 167 National Farmworker Jobs Program grantees or other farmworker organizations as part of the on-site review, and must discuss with representatives of these organizations perceived trends, and/or other relevant information concerning MSFWs in the area; and

(4) Meet with the SMA and discuss the full range of the ES services to MSFWs, including monitoring and the Complaint System.

(q) During the calendar quarter preceding the time of peak MSFW activity in each State, the RMA must meet with the SMA and must review in detail the State Workforce Agency's capability for providing the full range of services to MSFWs as required by ES regulations, during the upcoming harvest season. The RMA must offer technical assistance and recommend to the SWA and/or the Regional Administrator any changes in State policy or practice that the RMA finds necessary.

\* \* \* \* \*

(s) The RMA must initiate and maintain regular and personal contacts, including informal contacts in addition to those specifically required by these regulations, with SMAs in the region. In addition, the RMA must have personal and regular contact with the NMA. The RMA also must establish routine and regular contacts with WIOA sec. 167 National Farmworker Jobs Program grantees, other farmworker organizations and agricultural employers and/or employer

organizations in the RMA's region. The RMA must attend conferences or meetings of these groups wherever possible and must report to the Regional Administrator and the Regional Farm Labor Coordinated Enforcement Committee on these contacts when appropriate. The RMA also must make recommendations as to how the Department might better coordinate ES and WIOA sec. 167 National Farmworker Jobs Program services to MSFWs.

(t) The RMA must attend MSFW-related public meeting(s) conducted in the region, as appropriate. Following such meetings or hearings, the RMA must take such steps or make such recommendations to the Regional Administrator, as the RMA deems necessary to remedy problem(s) or condition(s) identified or described therein.

(u) The RMA must attempt to achieve regional solutions to any problems, deficiencies, or improper practices concerning services to MSFWs which are regional in scope. Further, the RMA must recommend policies, offer technical assistance, or take any other necessary steps as they deem desirable or appropriate on a regional, rather than State-by-State basis, to promote region-wide improvement in the delivery of ES services to MSFWs. The RMA must facilitate region-wide coordination and communication regarding provision of ES services to MSFWs among SMAs, State Administrators, and Federal ETA officials to the greatest extent possible. In the event that any SWA or other RMA, enforcement agency, or MSFW group refers a matter to the RMA which requires emergency action, the RMA must assist them in obtaining action by appropriate agencies and staff, inform the originating party of the action taken, and, upon request, provide written confirmation.

(v) The RMA must initiate and maintain such contacts as they deem necessary with RMAs in other regions to seek to resolve problems concerning MSFWs who work, live, or travel through the region. The RMA must recommend to the Regional Administrator and/or the National Office inter-regional cooperation on any particular matter, problem, or policy with respect to which inter-regional action is desirable.

\* \* \* \* \*

39. Amend § 658.604 by revising paragraph (c)(3)(i) to read as follows:

**§ 658.604 Assessment and evaluation of program performance data.**

\* \* \* \* \*

(c) \* \* \*

(3) \* \* \*

(i) Generally, for example, a SWA has direct and substantial control over the delivery of ES services such as referrals to jobs, job development contacts, counseling, referrals to career and supportive services, and the conduct of field checks.

\* \* \* \* \*

40. Amend § 658.702 by revising paragraphs (a), (d), (e), (f)(2), and (h)(5) to read as follows:

**§ 658.702 Initial action by the Regional Administrator.**

(a) The ETA Regional Administrator is responsible for ensuring that all SWAs in their region are in compliance with ES regulations.

\* \* \* \* \*

(d) If the Regional Administrator determines that there is no probable cause to believe that a SWA has violated ES regulations, they must retain all reports and supporting information in Department files. In all cases where the Regional Administrator has insufficient information to make a probable cause determination, they must so notify the Administrator in writing and the time for the investigation must be extended 20 additional business days.

(e) If the Regional Administrator determines there is probable cause to believe a SWA has violated ES regulations, they must issue a Notice of Initial Findings of Non-compliance by registered mail (or other legally viable means) to the offending SWA. The notice will specify the nature of the violation, cite the regulations involved, and indicate corrective action which may be imposed in accordance with paragraphs (g) and (h) of this section. If the non-compliance

involves services to MSFWs or the Complaint System, a copy of said notice must be sent to the NMA.

(f) \* \* \*

(2) After the period elapses, the Regional Administrator must prepare within 20 business days, written final findings which specify whether the SWA has violated ES regulations. If in the final findings the Regional Administrator determines the SWA has not violated ES regulations, the Regional Administrator must notify the State Administrator of this finding and retain supporting documents in their files. If the final finding involves services to MSFWs or the Complaint System, the Regional Administrator also must notify the RMA and the NMA. If the Regional Administrator determines a SWA has violated ES regulations, the Regional Administrator must prepare a Final Notice of Noncompliance which must specify the violation(s) and cite the regulations involved. The Final Notice of Noncompliance must be sent to the SWA by registered mail or other legally viable means. If the noncompliance involves services to MSFWs or the Complaint System, a copy of the Final Notice must be sent to the RMA and the NMA.

\* \* \* \* \*

(h) \* \* \*

(5) If, as a result of this review, the Regional Administrator determines the SWA has taken corrective action but is unable to determine if the violation has been corrected due to seasonality or other factors, the Regional Administrator must notify in writing the SWA and the Administrator of their findings. The Regional Administrator must conduct further follow-up at an appropriate time to make a final determination if the violation has been corrected. If the Regional Administrator's follow-up reveals that violations have not been corrected, the Regional Administrator must apply remedial actions to the SWA pursuant to § 658.704.

\* \* \* \* \*

41. Amend § 658.704 by revising the fifth sentence of paragraph (d) and the fourth sentence of (f)(2) to read as follows:

**§ 658.704 Remedial actions.**

\* \* \* \* \*

(d) \* \* \* The Regional Administrator must notify the SWA of their findings. \* \* \*

\* \* \* \* \*

(f) \* \* \*

(2) \* \* \* One copy must be retained. Two must be sent to the ETA National Office, one must be sent to the Solicitor of Labor, Attention: Associate Solicitor for Employment and Training, and, if the case involves violations of regulations governing services to MSFWs or the Complaint System, copies must be sent to the RMA and the NMA. \* \* \*

\* \* \* \* \*

42. Amend § 658.705 by revising the introductory text of paragraphs (b) and (b)(3) and paragraphs (c) through (f) to read as follows:

**§ 658.705 Decision to decertify.**

\* \* \* \* \*

(b) The Assistant Secretary must grant the request for decertification unless they make a finding that: \* \* \*

(3) The Assistant Secretary has reason to believe the SWA will achieve compliance within 80 business days unless exceptional circumstances necessitate more time, pursuant to the remedial action already applied or to be applied. (In the event the Assistant Secretary does not have sufficient information to act upon the request, they may postpone the determination for up to an additional 20 business days to obtain any available additional information.) In making a determination whether violations are “serious” or “continual,” as required by paragraph (b)(1) of this section, the Assistant Secretary must consider: \* \* \*



(c) If the Assistant Secretary denies a request for decertification, they must write a complete report documenting their findings and, if appropriate, instructing an alternate remedial action or actions be applied. Electronic copies of the report must be sent to the Regional Administrator. Notice of the Assistant Secretary's decision must be published promptly in the *Federal Register* and the report of the Assistant Secretary must be made available for public inspection and copying.

(d) If the Assistant Secretary decides decertification is appropriate, they must submit the case to the Secretary providing written explanation for their recommendation of decertification.

(e) Within 30 business days after receiving the Assistant Secretary's report, the Secretary must determine whether to decertify the SWA. The Secretary must grant the request for decertification unless they make one of the three findings set forth in paragraph (b) of this section. If the Secretary decides not to decertify, they must then instruct that remedial action be continued or that alternate actions be applied. The Secretary must write a report explaining their reasons for not decertifying the SWA and copies (hard copy and electronic) will be sent to the SWA. Notice of the Secretary's decision must be published promptly in the *Federal Register*, and the report of the Secretary must be made available for public inspection and copy.

(f) Where either the Assistant Secretary or the Secretary denies a request for decertification and orders further remedial action, the Regional Administrator must continue to monitor the SWA's compliance. If the SWA achieves compliance within the time established pursuant to paragraph (b) of this section, the Regional Administrator must terminate the remedial actions. If the SWA fails to achieve full compliance within that time period after the Secretary's decision not to decertify, the Regional Administrator must submit a report of their findings to the Assistant Secretary who must reconsider the request for decertification pursuant to the requirements of paragraph (b) of this section.

43. Amend § 658.706 to read as follows:

**§ 658.706 Notice of decertification.**

If the Secretary decides to decertify a SWA, they must send a Notice of Decertification to the SWA stating the reasons for this action and providing a 10 business day period during which the SWA may request an administrative hearing in writing to the Secretary. The document must be published promptly in the *Federal Register*.

44. Amend § 658.707 by revising paragraphs (a) and (b) to read as follows:

**§ 658.707 Requests for hearings.**

(a) Any SWA which received a Notice of Decertification under § 658.706 or a notice of disallowance under § 658.702(g) may request a hearing on the issue by filing a written request for hearing with the Secretary within 10 business days of receipt of the notice. Additionally, any SWA that has received a Notice of Remedial Action under § 658.704(c) may request a hearing by filing a written request with the Regional Administrator within 20 business days of the SWA's receipt of the notice. This request must state the reasons the SWA believes the basis of the decision to be wrong, and it must be signed by the State Administrator (electronic signatures may be accepted).

(b) When the Secretary or Regional Administrator receives a request for a hearing from a SWA, they must send copies of a file containing all materials and correspondence relevant to the case to the Assistant Secretary, the Regional Administrator, the Solicitor of Labor, and the Department of Labor Chief Administrative Law Judge. When the case involves violations of regulations governing services to MSFWs or the Complaint System, a copy must be sent to the NMA.

\* \* \* \* \*

**Angela Hanks,**

Acting Assistant Secretary for Employment and Training, Labor.

